119TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 119–421

PROTECTING PRUDENT INVESTMENT OF RETIREMENT SAVINGS ACT

DECEMBER 30, 2025.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WALBERG, from the Committee on Education and Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2988]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Workforce, to whom was referred the bill (H.R. 2988) to amend the Employee Retirement Income Security Act of 1974 to specify requirements concerning the consideration of pecuniary and non-pecuniary factors, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Protecting Prudent Investment of Retirement Savings Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

DIVISION A—INCREASE RETIREMENT EARNINGS

Sec. 1001. Short title.
Sec. 1002. Limitation on consideration of non-pecuniary factors by fiduciaries.

DIVISION B—NO DISCRIMINATION IN MY BENEFITS

Sec. 2001. Short title.
Sec. 2002. Service provider selection.

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DIVISION C—RETIREMENT PROXY PROTECTION

Sec. 3001. Short title.
Sec. 3002. Exercise of shareholder rights.

DIVISION D—PROVIDING COMPLETE INFORMATION TO RETIREMENT INVESTORS

Sec. 4001. Short title.
Sec. 4002. Brokerage window disclosures.

DIVISION A—INCREASE RETIREMENT EARNINGS

SEC. 1001. SHORT TITLE.

This division may be cited as the "Increase Retirement Earnings Act".

SEC. 1002. LIMITATION ON CONSIDERATION OF NON-PECUNIARY FACTORS BY FIDUCIARIES.

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

"(3) INTEREST BASED ON PECUNIARY FACTORS.—

"(A) IN GENERAL.—For purposes of paragraph (1), a fiduciary shall be considered to act solely in the interest of the participants and beneficiaries of the plan with respect to an investment or investment course of action only if the fiduciary's action with respect to such investment or investment course of action is based solely on pecuniary factors (except as provided in subparagraph (B)). The fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals. The weight given to any pecuniary factor by a fiduciary shall reflect a prudent assessment of the impact of such factor on risk and return.

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

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

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

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

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

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

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

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

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

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

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

DIVISION B—NO DISCRIMINATION IN MY BENEFITS

SEC. 2001. SHORT TITLE.

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

SEC. 2002. 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.".

DIVISION C—RETIREMENT PROXY PROTECTION

SEC. 3001. SHORT TITLE.

This division may be cited as the "Retirement Proxy Protection Act".

SEC. 3002. EXERCISE OF SHAREHOLDER RIGHTS.

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

"(f) EXERCISE OF SHAREHOLDER RIGHTS.—

"(1) AUTHORITY TO EXERCISE SHAREHOLDER RIGHTS.—

"(A) IN GENERAL.—The fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to those shares, including the right to vote proxies. When deciding whether to exercise a shareholder right and in exercising such right, including the voting of proxies, a fiduciary must act prudently and solely in the interests of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan. The fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right.

"(B) EXCEPTION.—This subsection shall not apply to voting, tender, and similar rights with respect to qualifying employer securities or securities held in an investment arrangement that is not a designated investment alternative in the event such rights are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities.

"(2) REQUIREMENTS FOR EXERCISE OF SHAREHOLDER RIGHTS.—A fiduciary, when deciding whether to exercise a shareholder right and when exercising a shareholder right—

"(A) shall—

"(i) act solely in accordance with the economic interest of the plan and its participants and beneficiaries;

"(ii) consider any costs involved;

"(iii) evaluate material facts that form the basis for any particular proxy vote or exercise of shareholder rights; and

"(iv) maintain a record of any proxy vote, proxy voting activity, or other exercise of a shareholder right, including any attempt to influence management; and

"(B) shall not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries.

"(3) MONITORING.—A fiduciary shall exercise prudence and diligence in the selection and monitoring of a person, if any, selected to advise or otherwise assist with the exercise of shareholder rights, including by providing research and analysis, recommendations on exercise of proxy voting or other shareholder rights, administrative services with respect to voting proxies, and recordkeeping and reporting services.

"(4) INVESTMENT MANAGERS AND PROXY ADVISORY FIRMS.—Where the authority to vote proxies or exercise other shareholder rights has been delegated to an investment manager pursuant to section 403(a), or a proxy voting advisory firm or other person who performs advisory services as to the voting of proxies or the exercise of other shareholder rights, a responsible plan fiduciary shall prudently monitor the proxy voting activities of such investment manager or advisory firm and determine whether such activities are in compliance with paragraphs (1) and (2).

"(5) VOTING POLICIES.—

"(A) IN GENERAL.—In deciding whether to vote a proxy pursuant to this subsection, the plan fiduciary may adopt a proxy voting policy, including a safe harbor proxy voting policy described in subparagraph (B), providing that the authority to vote a proxy shall be exercised pursuant to specific parameters designed to serve the economic interest of the plan.

"(B) SAFE HARBOR VOTING POLICY.—With respect to a decision not to vote a proxy, a fiduciary shall satisfy the fiduciary responsibilities under this subsection if such fiduciary adopts and follows a safe harbor proxy voting policy that—

"(i) limits voting resources to particular types of proposals that the fiduciary has prudently determined are substantially related to the business activities of the issuer or are expected to have a material effect on the value of the plan investment; or

"(ii) establishes that the fiduciary will refrain from voting on proposals or particular types of proposals when the assets of a plan invested in the issuer relative to the total assets of such plan are below 5 percent (or, in the event such assets are under management, when the assets under management invested in the issuer are below 5 percent of the total assets under management).

"(C) EXCEPTION.—No proxy voting policy adopted pursuant to this paragraph shall preclude a fiduciary from submitting a proxy vote when the fiduciary determines that the matter being voted on is expected to have a material economic effect on the investment performance of a plan's portfolio (or the investment performance of assets under management in the case of an investment manager); provided, however, that in all cases compliance with a safe harbor voting policy shall be presumed to satisfy fiduciary responsibilities with respect to decisions not to vote.

"(6) REVIEW.—A fiduciary shall periodically review any policy adopted under this subsection.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to an exercise of shareholder rights occurring on or after January 1, 2026.

DIVISION D—PROVIDING COMPLETE INFORMATION TO RETIREMENT INVESTORS

SEC. 4001. SHORT TITLE.

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

SEC. 4002. BROKERAGE WINDOW DISCLOSURES.

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

"(7) NOTICE REQUIREMENTS FOR BROKERAGE WINDOWS.—

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

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

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

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

"(i) 4 percent.
"(ii) 6 percent.
"(iii) 8 percent.".

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

"(46) DESIGNATED INVESTMENT ALTERNATIVE.—

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

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

(c) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on January 1, 2027.

PURPOSE

The purpose of H.R. 2988, the *Protecting Prudent Investment of Retirement Savings Act*, is to make clear that the financial interests of employee benefit plan participants and beneficiaries in their benefits come first.

COMMITTEE ACTION

117TH CONGRESS

Second Session—Hearings

On February 26, 2022, the Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, held a hearing titled "Improving Retirement Security and Access to Mental Health Benefits." The hearing discussed the Biden-Harris 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.; Ms. Karen Handorf, Senior Counsel, Berger Montague, Washington, D.C.; Ms. Amy Matsui, Director of Income Security and Senior Counsel, National Women's Law Center, Washington, D.C.; and Mr. 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). The hearing included a discussion of concerns regarding the DOL's proposed rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," including the Biden-Harris administration's efforts to undermine an investment fiduciary's duties of prudence and loyalty toward *Employee Retirement Income Security Act of 1974* (ERISA) employee benefit plans and the administration's view on incorporating ESG into the implementation of ERISA plans. Testifying before the Committee was the Honorable Martin J. Walsh, Secretary of Labor, Washington, D.C.

118TH CONGRESS

First Session—Hearing

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. The hearing discussed DOL's December 1, 2022, final rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," including concerns regarding the Biden-Harris administration's efforts to undermine an investment fiduciary's duties of prudence and loyalty when selecting and monitoring investments for ERISA plans and the administration's support for incorporating ESG into the administration of ERISA plans. Testifying before the Committee was the Honorable Julie A. Su, Acting Secretary, DOL, Washington, D.C.

First Session—Legislative Action

On February 7, 2023, Representative Andy Barr (R–KY) introduced a joint resolution of disapproval (H.J. Res. 30) under the *Congressional Review Act* to nullify the Biden-Harris administration DOL's final rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." The resolution was referred to the Committee on Education and the Workforce. The resolution rescinds the Biden-Harris administration's rule and would have the effect of reinstating the Trump administration's November 13, 2020, rule 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, 2023, the House of Representatives failed to override the veto by a vote of 219–200.

On September 5, 2023, Representative Erin Houchin (R–IN) introduced H.R. 5337, the *Retirement Proxy Protection Act*. The bill was referred to the Committee on Education and the Workforce. On September 14, 2023, the Committee considered H.R. 5337 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 23–19. The Committee considered the following amendments to H.R. 5337:

1. Representative Virginia Foxx (R–NC) offered an Amendment in the Nature of a Substitute (ANS) that made minor technical changes. The amendment was adopted by voice vote.
2. Representative Mark DeSaulnier (R–CA) offered a substitute amendment codifying the Biden-Harris administration's ESG and proxy voting rule. The amendment was defeated by a recorded vote of 19–23.

On September 5, 2023, Representative Bob Good (R–VA) introduced H.R. 5338, 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 considered an ANS offered by Representative Good that made minor technical changes. The amendment was adopted by voice vote.

On September 5, 2023, Representative Rick W. Allen (R–GA) introduced H.R. 5339, the *Roll Back ESG to Increase Retirement Earnings Act* (RETIRE Act). The bill was referred to the Committee on Education and the Workforce. On September 14, 2023, the Committee considered H.R. 5339 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 23–19. The Committee considered the following amendments to H.R. 5339:

1. Representative Allen offered an ANS that made minor technical changes. The amendment was adopted by voice vote.
2. Representative Robert C. "Bobby" Scott (D–VA) offered a substitute amendment to codify the Biden-Harris administration's ESG investing rule. The amendment was defeated by a vote of 19–23.

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

On September 18, 2024, the House of Representatives passed H.R. 5339, which now also included the texts of H.R. 5337, H.R. 5338, and H.R. 5340, by a vote of 217–206.

119TH CONGRESS

First Session—Hearing

On April 30, 2025, the Committee on Education and Workforce, Subcommittee on Health, Employment, Labor, and Pensions, held a hearing titled "Investing for the Future: Honoring ERISA's Promise to Participants." The hearing discussed the Biden-Harris administration's attempts to put its environmental and social agendas above the financial interests of retirees by prioritizing ESG factors when investing retirement plan assets. Testifying before the Subcommittee were Mr. Ike Brannon, President, Capitol Policy Analytics, Washington, D.C.; Mr. Charles Crain, Managing Vice President for Policy, National Association of Manufacturers, Washington, D.C.; Mr. Brandon Rees, Deputy Director, Corporations and Capital Markets, American Federation of Labor and Congress of Industrial Organizations, Washington, D.C.; and Mr. Max M. Schanzenbach, Northwestern University Pritzker School of Law, Chicago, Illinois.

First Session—Legislative Action

On April 24, 2025, Representative Allen introduced H.R. 2988, the *Protecting Prudent Investment of Retirement Savings Act*. The bill was referred to the Committee on Education and the Workforce. On June 25, 2025, the Committee considered H.R. 2988 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 21–15. The Committee considered an ANS offered by Chairman Allen that made minor technical changes. The amendment was adopted by voice vote.

COMMITTEE VIEWS

INTRODUCTION

H.R. 2988, the *Protecting Prudent Investment of Retirement Savings Act*, clarifies what ERISA and the U.S. Supreme Court already require: that fiduciaries manage plan assets, including the shareholder management rights appurtenant to those assets, for the exclusive purpose of a participant's or beneficiary's financial interest in his or her benefits under the plan. This legislation is needed because the Biden-Harris administration ignored ERISA's foundational principles in order to allow activists to invest and use shareholder management rights, such as proxy votes appurtenant to ERISA plan assets, to advance ESG goals at the expense of the financial interests of ERISA employee benefit plans. H.R. 2988 also 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 obligation of prudence and loyalty. H.R. 2988 further amends ERISA to codify a prohibition against discrimination on the basis of race, color, religion, sex, or national origin when selecting a service provider. Additionally, H.R. 2988 requires participant-directed ERISA individual account plans to give critically important information to participants before investing through a brokerage window. In short, H.R. 2988 protects the retirement savings of the U.S. workforce.

THE DUTY OF PRUDENCE AND LOYALTY UNDER EXISTING LAW

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

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

loyalty to the beneficiaries"[2] and make decisions "with an eye single to the interests of participants and beneficiaries."[3]

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."[4] Thus, fiduciaries are held to an expert prudence standard. Courts have held that the duty of prudence requires an ERISA fiduciary to monitor the appropriateness of investments continually.[5]

In 2014, the U.S. Supreme Court unanimously rejected non-pecuniary public policy goals as a basis for relaxing ERISA's fiduciary standards.[6] 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.[7] 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.[8]

The Supreme Court's holding applies to all non-pecuniary benefits. Thus, under ERISA, there is no room for advancing collateral goals such as ESG, even in a tiebreaker situation in which there are two economically equal investments.

At a Subcommittee on Health, Employment, Labor, and Pensions (HELP) hearing on April 30, 2025, Professor Max Schanzenbach, an economist and legal expert in fiduciary law, stated:

> ERISA's fiduciary guardrails have been tested by the advent of so-called ESG investing . . . Providing collateral social benefits to third parties is not consistent with the duty of loyalty under ERISA, and avoiding financially sound investments is not consistent with the duty of prudence. For these reasons, socially responsible investing was widely regarded as forbidden under ERISA.[9]

However, for the last 30 years, there have been attempts to erode ERISA's principles of prudence and loyalty in order to promote benefits other than the financial interest of participants and beneficiaries (i.e., "collateral benefits"). Professor Schanzenbach testified he believes that H.R. 2988 "improves ERISA regulations . . . while

[2] Donavan v. Mazzola, 716 F.2d 1226, 1238 (9th Cir. 1983) (citation omitted).
[3] Donavan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982).
[4] ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).
[5] Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828–29 (2015) (confirming ERISA fiduciary duty to monitor and remove imprudent trust investments).
[6] 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).
[7] *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 out in an ERISA plan.").
[8] *Id.* at 421.
[9] *Investing for the Future: Honoring ERISA's Promise to Investors: Hearing on H.R. 2988 Before the Subcomm. on Health, Emp't, Lab. & Pensions of the H. Comm. on Educ. & Workforce*, 119th Cong. (2025) (statement of Max Schanzenbach, Seigle Family Prof. of Law, Northwestern Univ., at 2), https://edworkforce.house.gov/uploadedfiles/schanzenbach_testimony.pdf.

adopting modest reforms that strengthen ERISA's fiduciary guardrails."[10]

DIVISION A OF H.R. 2988: INCREASE RETIREMENT EARNINGS

History of the Tiebreaker Rule When Investing ERISA Plan Assets

In 1994, DOL first articulated a "tiebreaker rule" in broadly applicable guidance allowing an ERISA fiduciary to consider ESG benefits ("collateral benefits") when choosing between two economically equal investments.[11] From the beginning, the tiebreaker rule was inherently inconsistent with ERISA's exclusive purpose rule.[12] Over the next two decades, DOL addressed the tiebreaker rule through sub-regulatory guidance, with Democrat administrations promoting the tiebreaker rule to use ERISA plan assets for collateral benefits and Republican administrations attempting to limit collateral benefit investing by reinforcing ERISA's exclusive purpose rule.[13]

Two distinguished professors wrote in the Stanford Law Review in 2020 on ERISA's fiduciary duty and ESG investing that "with respect to law, the tiebreaker is irreconcilable with the strict 'sole interest' or 'exclusive benefit' rule [of ERISA]."[14] The article is skeptical that true economic ties exist in the investment world, but if they do, then the appropriate solution is to invest in both instruments for purposes of diversification.

Trump Administration ESG Rule

In November 2020, DOL issued a final rule on ESG investing based on skepticism that a true tie can exist between two investments. Under this rule, a fiduciary can consider collateral benefits only if choosing between or among "investment alternatives that the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone."[15] The Trump administration rule requires a plan fiduciary to document (and, in essence, prove) that two investments are indistinguishable based on pecuniary factors before invoking the tiebreaker rule. If a fiduciary invokes the tiebreaker rule, then the fiduciary is required to document how any tiebreaking factor is consistent with the interests of the participants and beneficiaries

[10] *Id.* at 4.

[11] 59 Fed. Reg. 32,606 (June 23, 1994) (codified at 29 C.F.R. § 2509.94–1) (Interpretive Bulletin (IB) 94–1)). The term used in IB 94–1 is "economically targeted investments." Prior to issuing IB 94 1, DOL issued letters concerning a fiduciary's ability to consider the non-pecuniary effects of an investment and granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investments that produce non-pecuniary benefits. *See* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,856, 72,856 n.6 (Nov. 13, 2020).

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

[13] Edward Zelinsky, *Interpretive Bulletin 08–01 and Economically Targeted Investing: A Missed Opportunity*, 82 S. CAL. L. REV. POSTSCRIPT 11, 12 (2009) (criticizing subsequent Republican subregulatory guidance as only an attempt to limit collateral investing rather than repudiating it as incoherent and incompatible with ERISA's duty of loyalty).

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

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

in their financial benefits under the plan. This provision is intended to prevent abuse of the tiebreaker. The rule also prohibits fiduciaries from choosing default investments that have objectives or principal strategies that are non-pecuniary.

Biden-Harris Administration ESG Rule

In December 2022, DOL issued a final rule rescinding the Trump administration rule [16] and allowing a fiduciary to consider collateral benefits when choosing among or between investment alternatives that "equally serve the financial interests of the plan over the appropriate time horizon." [17] As such, the fiduciary may select an investment based on collateral benefits other than investment returns. This tiebreaker rule is vague enough to create a giant loophole, increasing ESG investing and completely eroding ERISA's exclusive purpose rule.

Impact on the Retirement Savings of America's Workers

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

On April 30, 2025, Mr. Ike Brannon, Ph.D., Senior Fellow at the Jack Kemp Foundation, testified before the HELP Subcommittee that "the evidence clearly shows ESG funds tend to lag the broader market, and the long-term ramifications of accepting even a small reduction in returns to one's retirement savings are significant." [18] He cited two reasons for the lower returns: (1) negative screening or exclusionary investment and (2) higher active management fees.[19] He also cited a study concluding that a one quarter percentage point reduction in net earnings over a lifetime of retirement savings translates to a 10 percent reduction in the balance at retirement.[20]

In the same hearing, another witness echoed Mr. Brannon's testimony. Mr. Charles Crain, Managing Vice President for Policy at the National Association of Manufacturers, testified:

> Many ESG-focused funds have a stated goal of subordinating investor return or increasing investor risk for the purpose of achieving political or social objectives. These funds also often assess higher management fees . . . [P]ursuing a social or political agenda (often at a higher cost) versus bolstering retirement security—are in many instances orthogonally opposed to one another, as evinced by many ESG funds' disclosures highlighting the potential

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

[17] 29 C.F.R. § 2550.404a–1(c)(2).

[18] *Investing for the Future, supra* note 9 (statement of Ike Brannon, Ph.D., Senior Fellow, Jack Kemp Found., at 2).

[19] *Id.* at 2–3.

[20] *Id.* at 3.

for reduced returns, increased risks, and heightened fees in service of social goals.[21]

Increase Retirement Earnings

Division A of H.R. 2988 protects the retirement savings and other ERISA-covered benefits of the U.S. workforce and reinforces what the Supreme Court has already stated: the exclusive purpose rule of ERISA precludes the consideration of nonpecuniary benefits.[22] ERISA's duty of loyalty does not provide any opportunity for an investment fiduciary to choose an economically inferior investment because it provides nonpecuniary benefits. H.R. 2988 also tightens the tiebreaker rule to require a fiduciary to prove, by way of documentation, that a tie exists because the plan fiduciary is "unable to distinguish on the basis of pecuniary factors alone." [23]

Conclusion of Views on Division A of H.R. 2988

To protect the financial interests of participants and beneficiaries in their benefits and to reinforce ERISA's existing duties of prudence and loyalty, Division A of H.R. 2988 ensures that ERISA's duties of prudence and loyalty will be honored. The intent of ERISA's exclusive purpose rule, as enacted by Congress and as interpreted by the U.S. Supreme Court, remains as clear now as when it was first signed into law. However, the Biden-Harris administration's regulations and activist agendas are undermining ERISA's protections. H.R. 2988 is essential for restoring and upholding the intent of ERISA. The U.S. workforce deserves nothing less.

DIVISION B OF H.R. 2988: NO DISCRIMINATION IN MY BENEFITS

Prudence Rule and Selection of Service Providers

The U.S. Supreme Court's holding on the exclusive purpose rule (discussed above) applies to all non-pecuniary benefits. 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." [24] Thus, fiduciaries are held to both a loyalty standard (the exclusive purpose rule) and an expert prudence standard when selecting service providers.

Attack on ERISA 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 pen-

[21] *Id.* (statement of Charles Crain, Managing Vice President, Pol'y, Nat'l Ass'n of Mfrs. at 2–3).

[22] Fifth Third Bancorp, 573 U.S. at 421 (the "benefits" to be pursued by ERISA fiduciaries as their "exclusive purpose" does not include "nonpecuniary benefits") (emphasis in original).

[23] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72,884.

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

sion fund made to increase opportunities for women and minority owned asset management firms?" and "Does your corporate pension fund have established priorities and expectations for investment staff to seek diverse asset managers?"[25]

In June 2023, the U.S. 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*.[26] This decision has encouraged skepticism and challenges regarding corporate DEI (diversity, equity, inclusion) policies. Moreover, the Supreme Court has unanimously rejected non-pecuniary public policy goals as a basis for relaxing ERISA's fiduciary standards.[27] Therefore, the type of discrimination encouraged by the Menendez letters is impermissible under ERISA and inconsistent with *Students for Fair Admission v. Harvard*.

Conclusion of Views on Division B of H.R. 2988

Division B of H.R. 2988 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 on the basis of race, color, religion, sex, or national origin in selecting service providers.

DIVISION C OF H.R. 2988: RETIREMENT PROXY PROTECTION

Exercising Shareholder Rights and Voting Proxies in ERISA Plans

The U.S. Supreme Court's holding on ERISA's exclusive purpose rule (discussed above) applies to all non-pecuniary benefits. Thus, under ERISA, there is no room for advancing collateral goals such as ESG by exercising shareholder rights (including proxy votes) appurtenant to plan assets at the expense of the economic interest of the plan and its participants and beneficiaries. 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."[28] Thus, fiduciaries are held to a loyalty standard (the exclusive purpose rule) and an expert prudence standard when exercising management rights appurtenant to ERISA plan assets. However, for the last 30 years, there have been attempts to erode ERISA's principles of loyalty and prudence in order to promote benefits other than the financial interest of participants and beneficiaries (*i.e.,* "collateral benefits") through the exercise of shareholder rights, including proxy voting exercised in the aggregate by proxy voting advisory firms.

DOL's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) that are inherent in a plan's invest-

[25] Press Release, Sen. Bob Menendez Newsroom, Menendez Leads Push for Big Corporations to Improve Diversity Among Corporate Pension Fund Managers (June 3, 2022).
[26] 143 S. Ct. 2141 (2023).
[27] *Dudenhoeffer*, 573 U.S. 409.
[28] ERISA § 404(a)(1)(B); 29 U.S.C. § 1104(a)(1)(B).

ments.[29] ERISA fiduciaries have interpreted DOL's guidance on proxy voting as a regulatory mandate to vote all proxies associated with assets held by an ERISA plan.[30] That is, many institutional investors have historically interpreted DOL guidance to require fiduciaries to vote every share on every matter on a proxy.[31]

As a result, plan fiduciaries turned to proxy advisor firms to vote proxies for the plan's investment holdings to comply with a perceived regulatory mandate.[32] In 1985, seeing an opportunity to fill a void in the market created by DOL, a former high-ranking DOL official founded Institutional Shareholder Services, Inc. (ISS) to provide proxy voting services while spreading the cost across its many customers.[33] By 2013, ISS, together with another proxy advisory firm, Glass, Lewis & Co., LLC (Glass Lewis), had a combined market share of 97 percent (61 percent for ISS and 36 percent for Glass Lewis).[34] By 2020, ISS reported that it voted over 10 million ballots annually on behalf of clients representing 4.2 trillion shares in about 44,000 shareholder meetings.[35] At the same time, Glass Lewis reported it provided services to 1,300 clients collectively managing more than $35 trillion in assets in about 20,000 shareholder meetings across 100 global markets per year.[36]

In short, ISS and Glass Lewis dominate the proxy advisory market.[37] The widespread reliance on proxy advisory firms gives these firms tremendous influence as they vote and otherwise wield significant influence on corporate governance matters. According to a Mercatus Center study, "These firms weigh in on issues such as the composition and operation of corporate boards, disclosure and compensation practices, and companies" policies on recycling, renewable energy, and political contributions."[38] The Wall Street Journal's editorial board wrote that ISS and Glass Lewis are "the

[29] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020). (discussing letter from Alan D. Leibowitz, Deputy Assistant Sec' of Lab., to Helmuth Fandl, Chairman of Retirement Bd., Avon Products, Inc. (Feb. 23, 1988)).

[30] *See* JAMES K. GLASSMAN & J.W. VERRET, MERCATUS CTR. GEORGE MASON UNIV., HOW TO FIX OUR BROKEN PROXY ADVISORY SYSTEM 5 (2013) ("changes at [DOL] in the 1980s mandat[ed] that ERISA pension plan fiduciaries—such as union, corporate, and other officials who control or manage a plan's assets—vote the plan's shares on the basis of active analysis, regardless of whether or not the fiduciary was certain that expending time and effort to analyze how to vote would create value for a fund.") (internal citation omitted).

[31] *See* Interpretive Bulletin 94–2: Interpretive Bulletin relating to written statements of investment policy, including proxy voting or guidelines, 59 Fed. Reg. 38,860, 81,659 n.17 (July 29, 1994) (quoting comment letter); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658, 81,666 (Dec. 16, 2020) (Trump administration proxy voting rule was intended "to correct a misunderstanding among some fiduciaries and other stakeholders that ERISA requires every proxy to be voted.").

[32] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO–17–47, CORPORATE SHAREHOLDER MEETINGS: PROXY ADVISORY FIRMS' ROLE IN VOTING AND CORPORATE GOVERNANCE PRACTICES (2016) (discussing increasing demand for proxy advisory firm services among institutional investors such as pension plans).

[33] ISS, 25FOR25: OBSERVATIONS ON THE PAST, PRESENT, AND FUTURE OF CORPORATE GOVERNANCE, IN CELEBRATION OF ISS' 25TH ANNIVERSARY iv ("[I]n 1985, Robert A.G. Monks founded Institutional Shareholder Services . . . with one simple goal: to help asset owners, and by extension, asset managers, to carry out their fiduciary obligations to vote their shares in a thoughtful and informed fashion."); *see also Labor Dept. Post Filled by Robert A.G. Monks,* N.Y. TIMES (Dec. 23, 1983).

[34] James K. Glassman & J.W. Verret, *supra* note 30, at 8.

[35] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55,082, 55,126 (Sept. 3, 2020).

[36] *Id.* at 55,127.

[37] Editorial, *Cracking the Proxy Advisory Duopoly*, WALL ST. J. (July 13, 2023) (ISS and Glass Lewis "boast outsize clout in U.S. corporate elections and make up an estimated 97% of the proxy advisory market," citing a 2018 article in the Harvard Law School Forum on Corporate Governance finding that "the two firms can swing between 10% and 30% of the shareholder votes").

[38] JAMES K. GLASSMAN & HESTER PEIRCE, MERCATUS CTR. GEORGE MASON UNIV., HOW PROXY FIRMS BECAME SO POWERFUL 1 (2013).

real driving force behind" an onslaught of ESG proxy resolutions from progressive investors.[39] Both ISS and Glass Lewis are foreign owned.[40] Neither proxy advisory firm appears to have significant investment in the success of the companies over which the proxy advisory firms wield such power. Instead, the economic impact of the ESG proxy voting policies of ISS and Glass Lewis affects ERISA plans and shareholders at large.

ISS benchmark policy proxy voting guidelines for the United States demonstrate the activist agenda. For example, the guidelines state:

> For companies that are significant greenhouse gas . . . emitters . . . generally vote against or withhold from the incumbent chair of the responsible committee (or other directors on a case-by case basis) in cases where ISS determines that the company is not taking the minimum steps needed to understand, assess, and mitigate risks related to climate change to the company and the larger economy.[41]

ISS proxy voting guidelines include policies for racial or ethnic diversity as to board composition and an entire section dedicated to "Social and Environmental Issues," including gender identity, racial equity, political expenditures, and lobbying Congress.[42]

Similarly, Glass Lewis's 2025 proxy voting guidelines for the United States also demonstrate its activist agenda.[43] For example, the guidelines provide that Glass Lewis will generally recommend against the chair of the nominating or governance committee at companies in the Russell 1000 index if the company has not provided any disclosure of director diversity and skills in any of Glass Lewis's tracked categories.[44] The guidelines provide that Glass Lewis will generally recommend against the chair of the nominating or governance committee at companies in the Russell 1000 index if the company has "fewer than one director from an under represented community on the board." The guidelines define "underrepresented" for this purpose as "an individual who self-identifies as Black, African American, North African, Middle Eastern, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as a member of the LGBQT+ community." In a search of the guidelines, "diversity" appears 36 times, "underrepresented" appears 8 times, and "climate" appears 15 times.

In addition, proxy voting firms may have conflicts of interest.[45] Besides proxy advisory services, ISS provides advisory consulting services and other products and services through ISS Corporate Solutions, Inc. (a wholly owned subsidiary).[46] As early as 2007, the U.S. Government Accountability Office found potential conflicts of

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[39] Editorial, *Cracking the Proxy Advisory Duopoly*, WALL ST. J. (July 13, 2023).

[40] *Id.*

[41] ISS, UNITED STATES PROXY VOTING GUIDELINES BENCHMARK POLICY RECOMMENDATIONS EFFECTIVE FOR MEETINGS ON OR AFTER FEBRUARY 1, 2025, https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.

[42] *Id.*

[43] GLASS LEWIS, 2025 BENCHMARK POLICY GUIDELINES, https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf.

[44] *Id.*

[45] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55,082, 55,126 (Sept. 3, 2020).

[46] *Id.*

interest between the consulting services provided by ISS and its proxy advisory services that could affect vote recommendations.[47] ISS may also advise companies on how to frame proposals to get the most votes.[48] At best, ISS advice influences the management of a corporation to adopt ISS policy preferences. At worst, a corporation purchases ISS advice in order to ensure an ISS affirmative vote on the corporation's proxy initiatives.

On April 30, 2025, Mr. Crain testified before the HELP Subcommittee that ISS and Glass Lewis control over 97 percent of the U.S. proxy advice market.[49] He further stated:

> ISS, for instance, can affect support for a dissident slate of board nominees by 73% and support for an uncontested director by 18%. In recent years . . . proxy firms have increasingly adopted prescriptive policies and provided recommendations on a wide range of environmental and social topics, which may or may not be relevant to an individual company's growth and value it creates for shareholders. Studies have shown that proxy firms are overwhelmingly supportive of activists' ESG proposals; for example, ISS recommended in favor of nearly 80% of environmental and social proposals during the 2023 proxy season. A 2022 NAM survey found that nearly 78% of publicly traded manufacturers were concerned that this increased pressure on ESG topics from proxy firms and other third parties will "increase costs for public companies, divert management and board time and resources, and endanger long-term value creation.[50]

Trump Administration Proxy Rule

In December 2020, the Trump administration issued a final rule on proxy voting.[51] Key elements included the following provisions:

- ERISA does not require the voting of every proxy or the exercise of every shareholder right.
- Shareholder activities may not promote nonpecuniary benefits or goals unrelated to the financial interests of the plan's participants and beneficiaries in the retirement income or financial benefits under the plan.
- Fiduciaries must maintain records on proxy voting activities or other exercises of shareholder rights.
- Fiduciaries who delegate authority to exercise shareholder rights must prudently monitor such activities for compliance with ERISA.
- Fiduciaries may adopt proxy voting policies designed to serve the plan's economic interests. A proxy voting policy that

[47] U.S. GOV'T ACCOUNTABILITY OFF., GAO–17–47, CORPORATE SHAREHOLDER MEETINGS: PROXY ADVISORY FIRMS' ROLE IN VOTING AND CORPORATE GOVERNANCE PRACTICES 9 (2016) ("[V]arious conflicts of interest can arise that have the potential to influence the research conducted and voting recommendations made by proxy advisory firms. The most commonly cited potential for conflict involves ISS, which provides services to both institutional investor clients and corporate clients. . . . ").

[48] James K. Glassman & Hester Pierce, *supra* note 38, at 2 (proxy advisory firms may advise companies, including how to help their ratings and get votes, and such conflicts of interest can affect recommendations).

[49] Statement of Charles Crain, *supra* note 21, at 4.

[50] *Id.*

[51] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020).

meets the following safe harbors shall be deemed to meet the plan's economic interests:

- ◦ Limiting proxy voting to particular types of proposals that the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have a material effect on the value of the plan's investment in relation to the plan's portfolio as a whole.
- ◦ Refraining from voting on proposals when the plan's holding in a single issuer relative to the plan's total investment assets is below a quantitative threshold that the fiduciary prudently determines is sufficiently small that the matter being voted on is not expected to have a material economic effect on the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager).

Biden-Harris Administration Proxy Rule

In December 2022, DOL issued a final ESG rule that superseded the Trump administration rule on proxy voting, in effect rescinding the Trump rule.[52] As a result, the current rule does not include any of the Trump rule requirements listed above. In the December 2022 rule, DOL claimed the Trump administration's proxy voting regulations put a thumb on the scale against ESG factors.[53] DOL also claimed the Trump administration rule "may be deterring fiduciaries from taking steps that other marketplace investors would take in improving investment portfolio resistance against the potential financial risks associated with climate change and other ESG factors." [54]

Impact on the Retirement Savings of America's Workers

DOL's subterfuge on proxy voting is not harmless. Imposing proxy voting mandates that push ERISA plans to use foreign-owned proxy advisory firms with activist agendas opens ERISA plan assets to exploitation by those who have no ownership interest in the assets. Ultimately, DOL's agenda promotes the use of ERISA plan assets to advance collateral benefits such as ESG and thus undermines a central cornerstone of ERISA. Further, such actions may lead to increased risk and lower returns for retirement savings. The cumulative harm, over a lifetime of retirement saving, could have a substantial adverse impact on a participant's lifestyle and welfare during his or her retirement years.

Division C of H.R. 2988 protects the retirement savings and other ERISA-covered benefits of the U.S. workforce and reinforces what the U.S. Supreme Court has already stated: the exclusive purpose rule of ERISA precludes the consideration of nonpecuniary benefits.[55] ERISA's duty of loyalty does not provide any opportunity for a proxy advisory firm or any other party to use ERISA plan assets to promote nonpecuniary benefits such as ESG considerations. Division C repeals DOL's perceived regulatory mandate to vote all proxies, which has fueled the use of activist proxy advisory

[52] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73,822 (Dec. 1, 2022).
[53] *Id.* at 73,854.
[54] *Id.* at 73,826.
[55] Fifth Third Bancorp, 573 U.S. 409, 421 (2014) (the "benefits" to be pursued by ERISA fiduciaries as their "exclusive purpose" do not include "nonpecuniary benefits").

firms that seek to promote ESG goals even at the expense of the economic welfare of ERISA plan participants and beneficiaries.

Conclusion of Views on Division C

To protect the financial interests of participants and beneficiaries in their benefits, and to reinforce ERISA's existing duties of prudence and loyalty, Division C of H.R. 2988 ensures that ERISA's duties of prudence and loyalty will be honored by taking proxy voting out of the hands of foreign-owned proxy advisory firms. The intent of ERISA's exclusive purpose rule, as enacted by Congress and affirmed by the U.S. Supreme Court, remains as clear now as when it was first signed into law. However, the Biden-Harris administration's regulations and activist agendas are undermining ERISA's protections. The Biden-Harris administration seeks to divert the shareholder rights appurtenant to ERISA plan assets to foreign-owned proxy advisory firms that use these ERISA plan assets to advance an activist agenda such as ESG considerations. H.R. 2988 is essential for restoring and upholding the intent of ERISA. The U.S. workforce deserves nothing less.

DIVISION D OF H.R. 2988: PROVIDING COMPLETE INFORMATION TO RETIREMENT INVESTORS

The U.S. Supreme Court's holding on the exclusive purpose rule (discussed above) applies to all non-pecuniary benefits. Thus, under ERISA, there is no room for advancing collateral goals such as ESG, even in a tiebreaker situation in which there are two economically equal investments. ERISA also requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character."[56] Thus, fiduciaries are held to both a loyalty standard (the exclusive purpose rule) and an expert prudence standard when constructing an investment menu for participant-directed investments in a defined contribution plan.

Brokerage Windows in Participant-Directed Individual Account Plans

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

When a participant invests through brokerage windows, the participant bypasses an ERISA plan's investment expertise. The participant's investment selection is not subject to any guardrails on ESG investments, such as the duty of prudence and loyalty under ERISA. As a result, participants may experience lower risk-adjusted returns and higher fees. An aggregate difference of 2 percent

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

in diminished investment returns and higher fees over a 40-year savings period can result in a retirement balance that is 40 percent lower.[57]

Brokerage Windows Distinguished from Designated Investment Alternatives

DOL guidance distinguishes between brokerage windows and a "designated investment alternative." DOL generally defines a "designated investment alternative" as "any investment alternative designated by the covered plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts." A designated investment alternative "does not include brokerage windows, self-directed brokerage accounts, or similar arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan."[58]

An ERISA fiduciary is clearly subject to the duties of prudence and loyalty when selecting and monitoring designated investment alternatives into which participants and beneficiaries may direct the investment of assets held in or contributed to their accounts.[59] On the other hand, guidance on the fiduciary duty with respect to the selection and monitoring of brokerage windows is limited. One view is that a fiduciary is subject to the duties of prudence and loyalty when selecting and monitoring a brokerage window as an investment vehicle with respect to the service provider and the fees charged to participants but is not responsible for a participant's investment directions that are made through a brokerage window. However, it is not clear that implementing the brokerage window itself as an investment vehicle available to participants under an ERISA plan is subject to the duty of prudence and loyalty.[60]

Case law on brokerage windows in individual account plans is also sparse.[61] In *Moitoso v. FMR LLC*, 451 F. Supp.3d 189 (D.

[57] *See* NATIONAL TREASURY (SOUTH AFRICA), CHARGES IN SOUTH AFRICAN RETIREMENT FUNDS 9 (July 11, 2013) (results of modeling calculations of the impact of a 2 percent annual reduction (in the form of a charge) yielding a final average retirement balance that is 40% lower at retirement age).

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

[59] 29 C.F.R. § 2550.404c–1(d)(2)(iv); 29 C.F.R. § 2550.404a–5(f).

[60] *Id*. 29 C.F.R. § 2550.404a5(h)(4) (providing that a brokerage window is not itself a designated investment alternative because it is not an investment specifically identified as available under the plan by the plan fiduciary). *But see* ERISA ADVISORY COUNCIL, REPORT TO THE HONORABLE MARTIN WALSH, UNITED STATES SECRETARY OF LABOR: UNDERSTANDING BROKERAGE WINDOWS IN SELF DIRECTED RETIREMENT PLANS (Dec. 2021) (referred to herein as the "2021 EAC Report") (reporting that plan sponsor representatives may decline to offer self-directed brokerage windows as being unsuitable for that particular employer's population (p.12); reporting ERISA fiduciary testimony that the decision to add a brokerage window is a fiduciary decision (p.15); reporting the testimony that the decision to implement a brokerage window is a fiduciary decision even if it is hardwired in the plan document (pp. 26, 28); reporting testimony that even if a brokerage account is hardwired in the plan document, *Dudenhoeffer* suggests that the duty of prudence trumps (p. 28)).

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

Mass. 2020), the court stated, "[I]n sum, there is a significant lack of clarity regarding the duties a fiduciary owes with respect to funds within a brokerage window." Existing case law suggests that an investment vehicle labeled by a plan as a brokerage window may nonetheless be subject to the same duties of prudence and loyalty to the extent that a plan fiduciary has significantly limited the selection of funds available through the window, causing such selections, in essence, to become designated investment alternatives.[62]

H.R. 2988 does not seek to disturb or change the duties of prudence and loyalty associated with brokerage windows (or designated investment alternatives) but only to remind participants and beneficiaries, when investing through true brokerage windows, that their individual selections are not being selected or monitored by a fiduciary bound by ERISA's duties of prudence and loyalty. In that regard, however, ERISA implicitly affirms the prevailing view that under a true brokerage window, a participant's investment selections are neither substantially winnowed nor monitored by a fiduciary.

2021 EAC Report

In 2021, the Advisory Council on Employee Welfare and Pension Benefit Plans (EAC) published the first comprehensive study on brokerage windows in ERISA plans (2021 EAC Report).[63] The study was informed by testimony from industry experts and provides insight into the prevalence of brokerage windows and why plan sponsors are choosing to offer brokerage windows, including providing opportunities for ESG investing. The study also raised concerns about whether all participants using brokerage windows understand the difference between investing through a brokerage window and investing through a plan's designated investment alternatives.

According to the Plan Sponsor Council of America, just over 23 percent of all ERISA individual account plans offer a brokerage window.[64] However, only 1.5 percent of ERISA assets are invested through brokerage windows.[65] Testimony before the EAC from recordkeepers indicated that 46 percent of plans that use Alight as a recordkeeper offer a brokerage window, 23 percent of plans that use Fidelity as their recordkeeper offer a brokerage window, and 20 percent of plans that use Vanguard as their recordkeeper offer a brokerage window.[66] Data presented to EAC demonstrated "an uptick in Millennials investing through brokerage windows,"[67] al-

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

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

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

[65] 2021 EAC Report, *supra* note 63.

[66] *Id.* at 16.

[67] *Id.* at 44.

though recordkeepers reported low utilization overall (e.g., 3 percent for Fidelity[68] and 0.5 percent for Vanguard[69]).

According to plan sponsor representatives interviewed for the 2021 EAC Report, brokerage windows allow participants to customize their portfolios outside of the designated investment options, including investing for collateral goals associated with ESG.[70] Recordkeepers similarly told EAC that plan sponsors add brokerage windows to their plans in response to participant requests for broader investment opportunities, including ESG funds, religion-compliant funds, and other investment options.[71] A representative of brokerage service providers explained that plan sponsors often add brokerage windows to accommodate participants who want to customize their investment portfolio beyond the designated investment alternatives, such as investing in a "green" fund.[72] A representative from a large trade group with investment fiduciary members also stated that brokerage windows were offered in plans managed by their investment fiduciary members to "keep participants with specialized investment needs or preferences in the plan, such as faith-based limitations on investments and social policy preferences."[73]

One issue raised several times in the 2021 EAC Report was a participant's ability to distinguish between investments that are designated investment alternatives and brokerage windows. One professional investment fiduciary recognized "the challenges of ensuring participants understand the difference in the fiduciary's role with respect to the designated investment alternatives within the core investment menu in contrast with the limited role over a brokerage window." According to the report, the professional investment fiduciary "thinks it should be clear to participants that there is no endorsement from the fiduciary of investments within a brokerage window, and this may be an area where . . . further guidance [is needed] on what is expected from plan fiduciaries in relation to brokerage windows."[74]

According to the report, Mr. Kevin Mahoney, a retirement consultant, also raised concerns that it "is important for participants to understand the additional risks associated with [brokerage windows.]"[75] A preeminent attorney specializing in ERISA fiduciary duties suggested to EAC that participants be educated that there is no monitoring and no prudent selection of the investments available through a brokerage window, and that there is a risk the participant could make an investment mistake.[76] An attorney representing the American Benefits Council (ABC) acknowledged that "the retirement community" understands that designated invest-

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

ment alternatives are "blessed" by the employer but that investments through brokerage windows are not.[77] Division D of H.R. 2988 seeks to extend that understanding to the participants and beneficiaries who choose to invest through a brokerage window.

The 2021 EAC Report noted broad consensus among the recordkeepers interviewed that "investment-specific disclosures for brokerage accounts would not be feasible, given the open-ended investment environment" and existing disclosure requirements suffice.[78] An attorney specializing in ERISA and representing ABC testified that investment-specific disclosures would be unworkable for most plan sponsors.[79]

While the 2021 EAC Report did not recommend mandating additional disclosures through a brokerage window, H.R. 2988 does not impose investment-specific disclosure requirements, nor does it duplicate existing disclosure requirements. The notice required under H.R. 2988 distinguishes between fiduciary oversight associated with a plan's designated investment alternatives and a brokerage window option. This type of notice does not seem to have been considered by EAC in its report.

Impact on the Retirement Savings of America's Workers

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

At the April 30, 2025, HELP Subcommittee hearing, Professor Schanzenbach testified that the provisions of H.R. 2988 are protective for defined contribution plan participants who choose to bypass designated investment alternatives to invest through brokerage windows. He stated:

> I strongly recommend to the Subcommittee the *Protecting Prudent Investment of Retirement Savings Act*'s requirement that plan participants using the brokerage window be warned that they are leaving a plan menu chosen under fiduciary obligation. Indeed, brokerage window participants will likely pay the highest fee share class for a mutual fund purchased through the brokerage window. In addition, if they purchase individual securities through the window, they will likely lose some of the benefits of diversification they could obtain in the plan.[80]

Division D of H.R. 2988 protects the retirement savings and other ERISA-covered benefits of the U.S. workforce while preserving access to brokerage windows offered in self-directed individual account plans. The bill requires plans to inform participants of any designated investment alternatives and the significance of those al-

[77] *Id.* at 25.
[78] *Id.* at 20.
[79] *Id.* at 24.
[80] Statement of Max Schanzenbach, *supra* note 9, at 5.

ternatives for retirement savings. The bill also quantifies for participants the impact that a reduction in income on their retirement savings would have over a lifetime of saving.

Conclusion of Views on Division D of H.R. 2988

To protect the financial interests of participants and beneficiaries in their benefits, and to reinforce ERISA's existing duties of prudence and loyalty, Division D of H.R. 2988 ensures that participants who self-direct their retirement savings through brokerage windows and who have access to designated investment alternatives under their plans will be informed of the significant differences of investing through a self-directed brokerage account as compared to a designated investment alternative and of the potential long-range impact of this choice on their retirement savings.

CONCLUSION

H.R. 2988 protects the retirement savings of the U.S. workforce by clarifying what ERISA and the U.S. Supreme Court already require: that fiduciaries manage employee benefit plan assets, including the shareholder management rights appurtenant to those assets, for the exclusive purpose of a participant's or beneficiary's financial interest in his or her benefits under the plan. H.R. 2988 further amends ERISA to codify a prohibition against discrimination on the basis of race, color, religion, sex, or national origin when selecting a service provider. Additionally, H.R. 2988 requires participant-directed ERISA individual account plans to give critically important information to participants before investing through a brokerage window. In short, H.R. 2988 protects the retirement savings of the U.S. workforce.

H.R. 2988 SUMMARY

H.R. 2988 amends ERISA to make clear that the financial interests of participants and beneficiaries in their benefits come first.

H.R. 2988 SECTION-BY-SECTION SUMMARY

Section 1—Short title; table of contents

Names the bill the *Protecting Prudent Investment of Retirement Savings Act* and provides a table of contents listing each division of the legislation.

DIVISION A—INCREASE RETIREMENT SAVINGS

Section 1001—Short title

Names Division A the *Increase Retirement Earnings Act*

Section 1002—Employee Retirement Security Income Act of 1974 Amendment.

Section 1002(a) amends ERISA section 404(a) with the following provisions:

- Clarifies that for purposes of ERISA section 404(a)(1), a fiduciary shall be considered to act solely in the interest of the participants and beneficiaries of the plan with respect to an investment or investment course of action only if the fiduciary's action with respect to such investment or investment course of action is based only on pecuniary factors (except as provided in subparagraph (B) which adds a tiebreaker rule, described below).

- Expressly states that a fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals.
- Provides that the weight given to any pecuniary factor by a fiduciary shall reflect a prudent assessment of the impact of such factor on risk and return.
- Adds a tiebreaker rule that narrowly defines a tie and narrowly constrains the factors used to consider in breaking a tie. To have a tie, the fiduciary must be unable to distinguish between or among investment alternatives or alternative courses of action on the basis of pecuniary factors alone.
- Requires fiduciaries to document, and in essence to prove, why pecuniary factors were not sufficient to select a plan investment or investment course of action.
- Requires other documentation to ensure that the investment fiduciary does not make decisions based on non-pecuniary factors. Specifically, requires the fiduciary to document how the selected investment compares to the alternative investments considered with regard to the composition of the portfolio with respect to diversification, the liquidity, and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and the projected return of the portfolio relative to the funding objectives of the plan.
- For fiduciaries who "declare a tie" in order to consider non-pecuniary factors, requires documentation of how the selected non-pecuniary factor or factors are consistent with the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.
- Addresses a fiduciary's selection of investment alternatives for participant-directed individual account plans intended to qualify for relief under existing ERISA section 404(c)(1)(A) by stating a fiduciary's actions must comply with H.R. 2988 in selecting or retaining the investment option. Further, any such investment option may not be added or retained as or included as a component of a default investment under existing section 404(c)(5) of ERISA, or any other type of default investment, if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.
- Defines "pecuniary factor" as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to [existing ERISA] section 402(b)(1)."
- Defines "investment course of action" as "any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the

case of an individual account plan, a designated investment alternative under the plan."

Section 1002(b) provides that the amendments made by the bill apply to actions taken by a fiduciary on or after the date that is 12 months after the date of enactment.

DIVISION B—NO DISCRIMINATION IN MY BENEFITS

Section 2001—Short title

Names Division B the *No Discrimination in My Benefits Act*

Section 2002—Selection of Service Providers

Section 1002(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.

DIVISION C—RETIREMENT PROXY PROTECTION

Section 3001—Short title

Names Division C the *Retirement Proxy Protection Act*

Section 3002—Exercise of Shareholder Rights

Section 3002(a) amends ERISA section 404, adding the following provisions:

- States that the fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to those shares, including the right to vote proxies.
- States that when deciding to exercise a shareholder right and when exercising such right, including the proxies, a fiduciary must act prudently and solely in the interests of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.
- Clarifies that the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right.
- Clarifies that H.R. 2988 does not apply to the voting, tender, or similar rights with respect to qualifying employer securities or securities held in an investment arrangement that is not a designated investment alternative in the event such rights are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities.
- Sets forth a fiduciary's six duties and obligations when deciding whether to exercise a shareholder right and when exercising a shareholder right:
    - The fiduciary must act solely in accordance with the economic interest of the plan and its participants and beneficiaries.
    - The fiduciary must consider any costs involved.

- The fiduciary must evaluate material facts that form the basis for any particular proxy vote or exercise of shareholder rights.
- The fiduciary must maintain a record of any proxy vote, any proxy voting activity, or other exercise of a shareholder right, including any attempt to influence management.
- The fiduciary shall not subordinate the interests of participants and beneficiaries in their retirement income or other financial benefits under the plan to any non-pecuniary objective.
- The fiduciary shall not promote non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries in their benefits under the plan.

• States that a fiduciary shall exercise prudence and diligence in the selection and monitoring of a person, if any, selected to advise or otherwise assist with the exercise of shareholder rights, including by providing research and analysis, recommendations on the exercise of proxy voting or other shareholder rights, administrative services with respect to voting proxies, and recordkeeping and reporting services.

• States that in the event the authority to vote proxies or exercise shareholder rights is delegated to an investment manager pursuant to ERISA, or to a proxy voting firm, or other person who performs advisory services as to the voting of proxies or the exercise of shareholder rights, a responsible plan fiduciary shall monitor the proxy voting activities of such investment manager or advisory firm and determine whether such activities are in compliance with the six obligations and duties set forth in H.R. 2988.

• Provides that in order to meet its duties under ERISA, a responsible plan fiduciary may adopt a proxy voting policy for deciding whether to vote a proxy, provided that the authority to vote a proxy is exercised pursuant to specific parameters designed to serve the economic interests of the plan.

• Sets forth two safe harbor proxy voting policies under which a fiduciary will automatically satisfy his or her fiduciary duties with respect to a decision not to vote a proxy.

- The first safe harbor is a voting policy that limits voting resources to particular types of proposals that the fiduciary has prudently determined are substantially related to the business activities of the issuer or are expected to have a material effect on the value of the plan investment.
- The second safe harbor is a voting policy under which the fiduciary will refrain from voting on all proposals or on particular types of proposals when the assets of a plan invested in the issuer are a small proportion of plan assets. (H.R. 2988 sets the proportion at 5 percent of plan assets or, in the case of assets under management, at 5 percent of the plan's total assets under management by a particular investment manager for a plan.)

• Provides that a fiduciary shall not be precluded from voting a proxy when the fiduciary determines that such action is expected to have a material economic effect on the investment performance of the plan's portfolio (or the investment performance of assets under management in the case of an investment manager).

- Provides that a fiduciary shall review any policy adopted under H.R. 2988.

Section 3002(b) provides that the amendments made by the bill apply to an exercise of shareholder rights occurring on or after January 1, 2026.

DIVISION D—PROVIDING COMPLETE INFORMATION TO RETIREMENT INVESTORS

Section 4001—Short title

Names Division D the *Providing Complete Information to Retirement Investors Act.*

Section 4002—Employee Retirement Income Security Act of 1974 Amendment

Section 4002(a) amends ERISA section 404(c) by adding a new paragraph "Notice Requirements for Brokerage Windows" with the provisions discussed below.

- A notice requirement must be met for certain plans to qualify for relief under ERISA section 404(c)(1) with respect to any investment that is not a designated investment alternative.
- The notice applies to a pension plan that provides individual accounts and provides a participant or beneficiary the opportunity to choose from designated investment alternatives.
- The notice applies to any participant or beneficiary directing an investment into, out of, or within an investment that is not a designated investment alternative each time the participant or beneficiary makes such a direction.
- The participant or beneficiary is required, as part of the notice process, to acknowledge each element of the notice.
- The notice is to be given sequentially in four separate parts, and the participant must acknowledge each part. The notice may be tailored to the plan's situation as long as it is substantially similar to the wording in the statute.
- The four parts of the notice are as follows:

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

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

- The bill requires a graph to be displayed along with the fourth element of the notice to display the projected retirement balance (using the latest available account balance) at age 67 based on an annual return of 4 percent, 6 percent, and 8 percent.

Section 4002(b) amends ERISA by adding a definition of "designated investment alternative" as "any investment alternative designated by a responsible fiduciary of an individual account plan described in section 404(c) into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts," but this does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by a responsible plan fiduciary.

Section 4002(b) also provides that the amendments made by the bill under subsection (a) (the notice requirements) take effect on January 1, 2027.

EXPLANATION OF AMENDMENTS

The amendment in the nature of a substitute is 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. 2988 makes clear that the financial interests of employee benefit plan participants and beneficiaries in their benefits come first. H.R. 2988 applies solely to the participants in employee benefit plans covered under the Employee Retirement Income Security Act of 1974 and therefore does not apply to 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 traditionally 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. 2988 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

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:
06/25/2025

COMMITTEE ON EDUCATION AND WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 7 Bill: H.R. 2988 Amendment Number: N/A

Disposition: Adopted by a Full Committee Roll Call Vote (21Y-15N)

Sponsor/Amendment: Motion to Report bill; as amended

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. WALBERG (MI) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. COURTNEY (CT)		X	
Mrs. FOXX (NC)	X			Ms. WILSON (FL)		X	
Mr. THOMPSON (PA)	X			Ms. BONAMICI (OR)		X	
Mr. GROTHMAN (WI)	X			Mr. TAKANO (CA)		X	
Ms. STEFANIK (NY)	X			Ms. ADAMS (NC)		X	
Mr. ALLEN (GA)	X			Mr. DESAULNIER (CA)		X	
Mr. COMER (KY)	X			Mr. NORCROSS (NJ)		X	
Mr. OWENS (UT)	X			Ms. MCBATH (GA)		X	
Ms. MCCLAIN (MI)	X			Ms. HAYES (CT)		X	
Mrs. MILLER (IL)	X			Ms. OMAR (MN)		X	
Ms. LETLOW (LA)	X			Ms. STEVENS (MI)		X	
Mr. KILEY (CA)	X			Mr. CASAR (TX)			X
Mr. RULLI (OH)	X			Ms. LEE (PA)		X	
Mr. MOYLAN (GU)	X			Mr. MANNION (NY)		X	
Mr. ONDER (MO)	X			Ms. ANSARI (AZ)		X	
Mr. MACKENZIE (PA)	X						
Mr. BAUMGARTNER (WA)	X						
Mr. HARRIS (NC)	X						
Mr. MESSMER (IN)	X						
Mr. FINE (FL)	X						

TOTALS: Ayes: 21 Nos: 15 Not Voting: 1

Total: 37 / Present: 36/ Report: 21Y-15N

(21 R - 16 D)

Statement of General Performance Goals and Objectives

In accordance with clause (3)(c) of rule XIII of the Rules of the House of Representatives, the goal of H.R. 2988 is to protect the interest of workers in their benefits provided under ERISA plans.

Duplication of Federal Programs

No provision of H.R. 2988 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

In compliance with clause 3(c)(6) of rule XIII the following hearing held during the 119th Congress was used to develop or consider H.R. 2988: On April 30, 2025, the Committee's Health, Employment, Labor, and Pensions Subcommittee held a hearing on "Investing for the Future: Honoring ERISA's Promise to Participants."

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 adopts as its own the cost estimate for the bill prepared by the Director of the Congressional Budget Office.

H.R. 2988, Protecting Prudent Investment of Retirement Savings Act
As ordered reported by the House Committee on Education and Workforce on June 25, 2025

By Fiscal Year, Millions of Dollars	2025	2025-2030	2025-2035
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	not estimated

Increases *net direct spending* in any of the four consecutive 10-year periods beginning in 2036?	No	Statutory pay-as-you-go procedures apply?	No
		Mandate Effects	
Increases *on-budget deficits* in any of the four consecutive 10-year periods beginning in 2036?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Under Threshold

* = between zero and $500,000.

H.R. 2988 would revise the standards that fiduciaries of private pension plans must apply to their investment decisions. Among other requirements, the bill would prohibit fiduciaries from prioritizing any objective other than maximizing beneficiaries' returns when they exercise shareholders' proxy rights. Plans would be required to provide information to participants who make self-directed investments through what are termed brokerage windows. The bill also would prohibit the consideration of factors such as race and sex in the hiring and retention of pension plan employees.

For this estimate, CBO assumes that the bill will be enacted by the end of calendar year 2025.

CBO and the staff of the Joint Committee on Taxation (JCT) estimate that enacting H.R. 2988 would not affect net direct spending or revenues over the 2025–2035 period. CBO estimates that implementing the bill would increase spending subject to appropriation by less than $500,000 over the 2025–2030 period. Any related spending would be subject to the availability of appropriated funds.

Fiduciaries' investment standards: H.R. 2988 would reinstate many provisions in a final rule published in November 2020 by the Employee Benefits Security Administration.[1] The bill would curtail pension plans' ability to apply environmental, social, or governance (commonly referred to as ESG) considerations to decisionmaking concerning plan investments. Under the Employee Retirement Income Security Act of 1974 (ERISA), fiduciaries of private-pension plans must base investment decisions on the interests of their participants. The November 2020 rule required fiduciaries to base decisions solely on pecuniary factors, but that rule included a "tiebreaker" standard, under which fiduciaries could consider other benefits if alternative investment options were not economically distinguishable.

In December 2022, the Department of Labor (DOL) issued a final rule that allows fiduciaries to consider environmental, social, and

[1] Employee Benefits Security Administration, "Financial Factors in Selecting Plan Investments," final rule, 85 *Fed. Reg.* 72846 (November 13, 2020), https://tinyurl.com/ycy4nt84.

governance factors in their decisionmaking.[2] Under that rule, fiduciaries cannot subordinate the interests of participants and beneficiaries to other objectives and cannot sacrifice returns on investment or take on additional risk in investment.

A group of states and companies sued DOL arguing that the December 2022 rule is impermissible under ERISA. Although a lower court upheld that rule, DOL plans to issue a new rule on the subject that will reverse the December 2022 rule.

Proxy voting: H.R. 2988 would specify plans' obligations for proxy voting and direct fiduciaries to make investment decisions solely for the financial benefit of participants. The bill would reinstate many of the provisions in a final rule published by the Employee Benefits Security Administration in December 2020.[3]

Provide information to participants: The bill would require pension plans to warn participants in brokerage windows about the risks associated with nonstandard investments. CBO and JCT do not expect that providing such information would significantly change participants' investment choices, and to the extent that choices did change under the bill, each agency expects an equally likely chance that small increases or decreases in federal outlays or revenues would result.

Employment practices: H.R. 2988 would require pension plans to hire employees and engage service providers without regard to race, color, religion, sex, or national origin.

Federal costs: Because fiduciaries are required to maximize investment performance, CBO and JCT do not expect that enacting the bill would substantially affect pension plans' investment outcomes. Projections of returns are inherently uncertain, but each agency expects that insignificant increases or decreases in federal outlays or revenues would stem from enacting the bill.

The December 2022 final rule may induce individual employers or workers to increase or decrease their pension contributions. Thus, enacting H.R. 2988 could affect federal revenues if contributions to tax-preferred plans changed. CBO and JCT project that total contributions will not change substantially, however, and thus estimate that there would be no effect on net direct spending or revenues under the bill. Premiums received by the Pension Benefit Guaranty Corporation also could be affected because they are based in part on plan assets. (Those amounts are recorded in the budget as offsetting collections—that is, as net reductions in direct spending outlays.)

Based on the costs of similar activities, CBO estimates that any administrative costs to implement H.R. 2988 would be insignificant. Any related spending would be subject to the availability of appropriated funds.

Mandates: H.R. 2988 would impose private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) by requiring fiduciaries to act solely in the financial interests of beneficiaries when they exercise shareholders' proxy rights and by requiring

[2] Employee Benefits Security Administration, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," final rule, 87 *Fed. Reg.* 73822 (December 1, 2022), https://tinyurl.com/ycxz46z7.

[3] Employee Benefits Security Administration, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," final rule, 85 *Fed. Reg.* 81658 (December 16, 2020), https://tinyurl.com/yc72nu5m.

pension plans that offer brokerage windows to warn participants of the risks associated with alternative investments.

CBO estimates that the cost to comply with H.R. 2988 would not exceed the annual threshold established in UMRA for private-sector mandates ($206 million in 2025, adjusted annually for inflation).

H.R. 2988 contains no intergovernmental mandates as defined in UMRA.

CBO has not reviewed the nondiscrimination provisions of the bill 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 the legislation falls within that exclusion because it would prohibit discrimination in hiring or retaining personnel based on race, color, religion, sex, or national origin.

The CBO staff contacts for this estimate are Noah Meyerson (for federal costs) and Andrew Laughlin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

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. 2988. 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 for the bill prepared by the Director of the Congressional Budget Office.

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 A—GENERAL PROVISIONS

* * * * * * *

DEFINITIONS

SEC. 3. For purposes of this title:

(1) The terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program which was heretofore or is here-

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

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

(i) provides retirement income to employees, or

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

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

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

(i) severance pay arrangements, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) The term "Secretary" means the Secretary of Labor.

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

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

(B) a person providing services to such plan;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) medical benefits, and

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

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

(23) The term "accrued benefit" means—

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

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

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

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

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

(B) the later of—

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

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

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

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

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

(28) The term "normal service cost" or "normal cost" means the annual cost of future pension benefits and administrative expenses

assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

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

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

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

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

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

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

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

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

(C) For purposes of this paragraph—

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

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

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

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

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

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

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

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

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

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

72(m)(7) of the Internal Revenue Code of 1986) at the time of such separation from service.

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

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

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

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

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

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

whichever has the latest ending date.

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

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

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

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

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

determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph—

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

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

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

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

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

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

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

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

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

4975 of the Internal Revenue Code of 1986 applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity.

(43) POOLED EMPLOYER PLAN.—

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

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

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

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

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

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

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

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

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

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

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

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

(v) require—

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

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

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

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

(i) a multiemployer plan; or

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

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

(44) POOLED PLAN PROVIDER.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(46) DESIGNATED INVESTMENT ALTERNATIVE.—

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

(B) EXCEPTION.—The term "designated investment alternative" does not include brokerage windows, self-directed

brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by a responsible plan fiduciary.

* * * * * * *

SUBTITLE B—REGULATORY PROVISIONS

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

* * * * * * *

FIDUCIARY DUTIES

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

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

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

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

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV**[**.**]***; 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 acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

(3) INTEREST BASED ON PECUNIARY FACTORS.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the earlier of—

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

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

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

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

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

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

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

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

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

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

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

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

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

(B) NOTICE REQUIREMENTS.—

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

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

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

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

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

(7) NOTICE REQUIREMENTS FOR BROKERAGE WINDOWS.—

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

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

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

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

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

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

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

(i) 4 percent.

(ii) 6 percent.

(iii) 8 percent.

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

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

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

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

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

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

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

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

(2) For purposes of this subsection—

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

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

(e) SAFE HARBOR FOR ANNUITY SELECTION.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) NO REQUIREMENT TO SELECT LOWEST COST.—Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the con-

tract 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.

(f) EXERCISE OF SHAREHOLDER RIGHTS.—

(1) AUTHORITY TO EXERCISE SHAREHOLDER RIGHTS.—

(A) IN GENERAL.—The fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to those shares, including the right to vote proxies. When deciding whether to exercise a shareholder right and in exercising such right, including

the voting of proxies, a fiduciary must act prudently and solely in the interests of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan. The fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right.

(B) EXCEPTION.—This subsection shall not apply to voting, tender, and similar rights with respect to qualifying employer securities or securities held in an investment arrangement that is not a designated investment alternative in the event such rights are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities.

(2) REQUIREMENTS FOR EXERCISE OF SHAREHOLDER RIGHTS.—A fiduciary, when deciding whether to exercise a shareholder right and when exercising a shareholder right—

(A) shall—

(i) act solely in accordance with the economic interest of the plan and its participants and beneficiaries;

(ii) consider any costs involved;

(iii) evaluate material facts that form the basis for any particular proxy vote or exercise of shareholder rights; and

(iv) maintain a record of any proxy vote, proxy voting activity, or other exercise of a shareholder right, including any attempt to influence management; and

(B) shall not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries.

(3) MONITORING.—A fiduciary shall exercise prudence and diligence in the selection and monitoring of a person, if any, selected to advise or otherwise assist with the exercise of shareholder rights, including by providing research and analysis, recommendations on exercise of proxy voting or other shareholder rights, administrative services with respect to voting proxies, and recordkeeping and reporting services.

(4) INVESTMENT MANAGERS AND PROXY ADVISORY FIRMS.—Where the authority to vote proxies or exercise other shareholder rights has been delegated to an investment manager pursuant to section 403(a), or a proxy voting advisory firm or other person who performs advisory services as to the voting of proxies or the exercise of other shareholder rights, a responsible plan fiduciary shall prudently monitor the proxy voting activities of such investment manager or advisory firm and determine whether such activities are in compliance with paragraphs (1) and (2).

(5) VOTING POLICIES.—

(A) IN GENERAL.—In deciding whether to vote a proxy pursuant to this subsection, the plan fiduciary may adopt a proxy voting policy, including a safe harbor proxy voting policy described in subparagraph (B), providing that the

authority to vote a proxy shall be exercised pursuant to specific parameters designed to serve the economic interest of the plan.

(B) SAFE HARBOR VOTING POLICY.—With respect to a decision not to vote a proxy, a fiduciary shall satisfy the fiduciary responsibilities under this subsection if such fiduciary adopts and follows a safe harbor proxy voting policy that—

(i) limits voting resources to particular types of proposals that the fiduciary has prudently determined are substantially related to the business activities of the issuer or are expected to have a material effect on the value of the plan investment; or

(ii) establishes that the fiduciary will refrain from voting on proposals or particular types of proposals when the assets of a plan invested in the issuer relative to the total assets of such plan are below 5 percent (or, in the event such assets are under management, when the assets under management invested in the issuer are below 5 percent of the total assets under management).

(C) EXCEPTION.—No proxy voting policy adopted pursuant to this paragraph shall preclude a fiduciary from submitting a proxy vote when the fiduciary determines that the matter being voted on is expected to have a material economic effect on the investment performance of a plan's portfolio (or the investment performance of assets under management in the case of an investment manager); provided, however, that in all cases compliance with a safe harbor voting policy shall be presumed to satisfy fiduciary responsibilities with respect to decisions not to vote.

(6) REVIEW.—A fiduciary shall periodically review any policy adopted under this subsection.

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MINORITY VIEWS

INTRODUCTION

H.R. 2988, the *Protecting Prudent Investment of Retirement Savings Act,* amends the *Employee Retirement Income Security Act of 1974* (ERISA)[1] to codify two regulations from the first Trump Administration regarding environmental, social, governance (ESG) factors in the selection of retirement investments[2] and proxy voting.[3] Additionally, H.R. 2988 prohibits retirement plan fiduciaries from selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of the plan based on race, color, religion, sex, or national origin. H.R. 2988 also requires that retirement plan participants receive notice when they make certain investments. In sum, H.R. 2988 reflects a mistaken view about ESG factors in retirement investing and undermines retirement plan fiduciaries' ability to make prudent decisions in retirement plan participants' bests interests. H.R. 2988 is opposed by dozens of organizations,[4] including the AFL CIO, American Association of People with Disabilities, American Federation of Teachers, Americans for Financial Reform, CERES, Communications Workers of America, Interfaith Center on Corporate Responsibility, International Union of Bricklayers and Allied Craftworkers, Oxfam America, Public Citizen, Sierra Club, United Food and Commercial Workers International Union, and the U.S. Sustainable Investment Forum.

COMMITTEE REPUBLICANS ARE WRONG ABOUT ESG FACTORS

Committee Republicans characterized H.R. 2988 as a bill that "seeks to ensure financial institutions are focused on maximizing returns in retirement plans rather than on woke ESG factors."[5] This is a false construct. ESG factors enable investors, including retirement plans, to be informed about potential risks and opportunities when evaluating an investment portfolio. Additionally, ESG investing can be viewed as a risk mitigation strategy enabling re-

[1] 29 U.S.C. § 1104.

[2] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Nov. 13, 2020) [hereinafter 2020 Final ESG Rule], https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf.

[3] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Federal Register 81658 (Dec. 16, 2020) [hereinafter 2020 Final Proxy Voting Rule], https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27465.pdf.

[4] *See* Letter from Americans for Financial Reform, et al to Chair Tim Walberg and Ranking Member Bobby Scott, H. Comm. on Educ. & Workforce, Full Committee Markup (June 25, 2025) [hereinafter Americans for Financial Reform letter], https://ourfinancialsecurity.org/2025/06/letters-to-congress-letter-in-opposition-to-h-r-2988-protecting-prudent-investment-of-retirement-savings-act/; Letter from CERES to Comm. on Educ. & Workforce Chair Walberg and Comm. Members, H. Comm. on Educ. & Workforce, Full Committee Markup (June 25, 2025), https://house.app.box.com/s/eikni8ns1vv5t71krbb8abzoc3ydlvzk/file/1904803386220; Statement from U.S. Sustainable Investment Forum, (June 23, 2025), (on file with Committee staff).

[5] Press Release, H. Comm. on Educ. & the Workforce, *@EdWorkforceCmte Passes Bills on Education Freedom, Accreditation, and Workers' Benefits* (June 25, 2025), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=412598.

tirement plans to consider investments that account for companies' negative externalities, such as high liability risks, fossil fuel dependent business practices, and poor treatment of workers. These are among the factors that would cause stocks to suffer over decades, which is precisely the time horizon of retirement investing.

Maximizing returns is tied to careful consideration of ESG factors, and retirement plan fiduciaries and major corporations understand this. BlackRock, which is the world's largest asset manager, has stated that its "investment conviction is that incorporating sustainability-related factors—which are often characterized and grouped into ESG categories—into investment decisions can provide better risk-adjusted returns to investors over the long-term." [6]

In July 2023, the New York University (NYU) Stern Center for Sustainable Business and Rockefeller Asset Management, collaborated to examine the relationship between ESG and financial performance in more than 1,000 research papers from 2015–2020. They found that "empirical studies and meta-analyses consistently demonstrate a positive relationship between ESG integration and financial performance." [7] They also concluded that "some ESG strategies seem to generate market rate or excess returns when compared to conventional investment strategies, especially for long-term investors, and provide downside protection during economic or social crisis. Notably, very few studies found definitive negative correlations between ESG and financial performance." [8]

Committee Democrats are not arguing that ESG investments always perform better or have lower fees than traditional non-ESG investments, but we understand ESG's relevance to and impact on workers' retirement security. As such, Committee Democrats believe that retirement plan fiduciaries should be permitted to consider ESG factors when making investment decisions for plan participants.

H.R. 2988 CODIFIES A FLAWED ESG RULE FROM THE FIRST TRUMP ADMINISTRATION

In 2020, the first Trump Administration finalized an ESG rule [9] requiring plan fiduciaries to make investment decisions solely based on "pecuniary" factors, defined as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA." [10] The Trump-era ESG rule permitted consideration of "non-pecuniary" factors when a fiduciary is unable to distinguish reasonably available alternatives on the basis of pecuniary factors alone.[11] However, in such instances, the Trump-era ESG rule imposed a first-of-its-kind paperwork requirement on plan fiduciaries

[6] Comment No. EBSA–2021–0013–0734 at 1, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC03/00729.pdf.

[7] Tensie Whelan *et al., ESG And Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015–2020* at 2, New York University Stern School of Business (Feb. 2021), https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf.

[8] *Id.*

[9] 2020 Final ESG Rule, *supra* note 2.

[10] *Id* at 72884.

[11] *Id*. at 72851.

to "document the basis" for concluding that a distinguishing factor could not be found and why the selected investment was chosen based on the purposes of the plan.[12] The Trump-era ESG rule also prohibited non-pecuniary investments, such as ESG-themed funds, from being a qualified default investment alternative (QDIA) such as a target date fund (TDF).[13] H.R. 2988 codifies the Trump-era ESG rule.

There was significant opposition to the Trump-era ESG rule. According to an analysis of the more than 8,700 public comments conducted by the U.S. Sustainable Investment Forum and other organizations, 96% of the comments or petition signatures from individuals expressed opposition.[14] One of the key findings of the analysis was that "[o]pposition was especially high among investment-related groups, with asset managers, financial advisors, financial service providers, asset owners, pension plans, and investment organizations either unanimous or all but unanimous opposing the proposal."[15] Specifically, BlackRock, Fidelity, State Street Global Advisors, T. Rowe Price, and Vanguard submitted opposing comments to the Department of Labor (DOL).[16]

At an April 2025 hearing of the Committee on Education and Workforce's Subcommittee on Health, Employment, Labor, and Pensions, one witness noted that the distinction between "pecuniary" and "non-pecuniary" is "unworkable because all investments inherently include pecuniary and non-pecuniary features . . . There is no universally accepted definition of what is a pecuniary vs. a non-pecuniary consideration. This vague language is nowhere to be found in the text of ERISA."[17] Echoing this point during the Committee's markup of H.R. 2988, Ranking Member Scott said:

> [L]et's say there's a real estate fund that appears to have short-term 'pecuniary' value for participants; but the properties are near the shoreline and subject to rising sea levels over the long term that would be considered 'non-pecuniary' in nature. The Trump-era E–S–G rule puts needless constraints on plan fiduciaries' ability to weigh the full scope of this kind of investment—and that's not in the best interests of retirement savers.[18]

In 2022, the Biden Administration finalized a rule that reversed the Trump-era ESG rule and retained the long-standing duty of a fiduciary to focus on relevant risk-return factors in selecting invest-

[12] *Id*. at 72874.
[13] *Id*. at 72863.
[14] Press Release, Ceres, Investor Organizations and Financial Industry Firms' Analysis of Public Comments on Department of Labor's ESG Proposal Shows Landslide of Opposition (Aug. 20, 2020), https://www.ceres.org/news-center/press-releases/investor-organizations-and-financial-industry-firms-analysis-public.
[15] *Id.*
[16] Rachel Koning Beals, *Trump Labor Department's Rule Discouraging ESG Investing in Retirement Plans is Finalized Over Swell of Objections,* MARKETWATCH (Oct. 31, 2020), https://www.marketwatch.com/story/trumps-labor-rule-discouraging-esg-investing-in-retirement-plans-is-finalized-over-swell-of-objections-11604089492.
[17] *Investing for the Future: Honoring ERISA's Promise to Participants:* Hearing before the H. Comm on Educ and Workforce, 119th Cong. (2025)(statement of Brandon Rees, Deputy Director of Corporations and Capital Markets, AFL–CIO), https://www.congress.gov/119/meeting/house/118155/witnesses/HHRG-119-ED02-Wstate-ReesB-20250430.pdf.
[18] *Markup of Bills on Education Freedom, Accreditation, and Workers' Benefits:* Markup before the H. Comm. on Educ. & the Workforce, 119th Cong. (2025)(statement of Ranking Member Robert C. "Bobby" Scott on H.R. 2988), https://www.youtube.com/live/4ym5hhWETnQ.

ments.[19] Specifically, the Biden-era final ESG rule permits fiduciaries to consider ESG factors, but only when consistent with the requirement that all investments must serve investors' economic interests. It does not require consideration of ESG factors, and moreover it is explicit that ESG considerations alone cannot justify sacrificing investment returns or taking on additional risks when inconsistent with those economic interests. Committee Democrats strongly support the Biden-era ESG rule, which has been upheld twice in federal district court by a judge who was appointed by President Trump.[20] Regrettably, the Trump Administration recently signaled it would pursue changing and/or rescinding the existing Biden-era rule through regulation.

H.R. 2988 CODIFIES A MISGUIDED PROXY VOTING RULE FROM THE FIRST TRUMP ADMINISTRATION

Retirement savings plans covered by ERISA likely have stocks as part of their investment portfolios.[21] Stock ownership provides an investor with certain shareholder rights, including the right to vote on matters such as electing the board of directors, executive compensation, and shareholder proposals on ESG-related issues. Such voting often occurs by proxy. The voting of proxies is not an arbitrary exercise, but rather an important mechanism for shareholders to monitor and hold management accountable and enhance long-term value of plan assets. For example, in the years since the scandal at Worldcom, a telecommunications corporation whose executives engaged in massive accounting fraud, it has become a common understanding that prudent corporate governance practices can mitigate risks. Proxy voting plays a pivotal role in enhancing investment returns by improving corporate accountability and potentially reducing the risk of wrongdoing.

Over the years, DOL periodically issued guidance on proxy voting issues yet consistently affirmed that ERISA's fiduciary duties of loyalty and prudence apply to proxy voting by pension and employee benefit plans.[22] This is because the exercise of shareholder rights is key to ensuring management's accountability to the shareholders that own the company.

In 2020, the first Trump Administration proposed a rule on proxy voting that was based on a flawed premise that:

> [S]ome fiduciaries . . . may be acting in ways that unwittingly allow plan assets to be used to support or pursue proxy proposals for environmental, social, or public policy agendas that have no connection to increasing the value of

[19] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Federal Register 73822–73886 (Dec. 1, 2022), https://www.govinfo.gov/content/pkg/FR-2022-12-01/pdf/2022-25783.pdf.

[20] Memorandum Opinion and Order, State of Utah et al. v. Vince Micone (Feb. 14, 2025), Case No. 2:23–cv–00016–Z at 12.

[21] *See* U.S. Congressional Research Service, *Department of Labor Guidance and Regulations on the Exercise of Shareholder Rights by Private-Sector Pension Plans* (IF12362, Mar. 27, 2023), https://sgp.fas.org/crs/misc/IF12362.pdf.

[22] *See* Letter from U.S. Department of Labor to Mr. Helmuth Fandl, Chairman of the Retirement Board of Avon Products, Inc. (Feb. 23, 1988), 198 WL 897696 ("In general, the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock."). The Department of Labor subsequently restated this view in 1994 (Interpretive Bulletin 94–2), 2008 (Interpretive Bulletin 2008–02), 2016 (Interpretative Bulletin 2016–01), and 2018 (Field Assistance Bulletin 2018–01).

> investments used for the payment of benefits or plan administrative expenses, and in fact may have unnecessarily increased plan expenses.[23]

During the public comment period, numerous stakeholders, including those in the financial services industry, questioned or strongly objected to the Trump Administration's premise. For instance, Teachers Insurance and Annuity Association of America (TIAA), which, according to its comment letter on the Trump-era proposed rule, serves more than five million retirement plan participants, said "ESG factors are often in direct alignment with a company's pecuniary considerations—and thus it is often the case that voting proxies on ESG-related issues is in the economic interests of investors."[24] Many other stakeholders agreed. According to the Interfaith Center on Corporate Responsibility, which is a broad coalition of institutional investors collectively representing over $500 billion in invested capital, "[n]o evidence appears . . . supporting the notion that fiduciaries are confused about their obligations with respect to proxy voting."[25]

Nevertheless, in December 2020, the Trump Administration finalized its proxy voting rule that reflected its strong skepticism about proxy voting and ESG. It imposed first-of-its-kind restrictions on plan fiduciaries when it came to exercising their shareholder rights. The Trump-era proxy voting rule specified that fiduciaries do not have an obligation to vote on all proxies and included two safe harbors that permitted fiduciaries to limit or refrain from proxy voting in certain situations.[26] The rule also imposed new onerous recordkeeping requirements and monitoring obligations regarding the exercise of shareholder rights. Many retirement stakeholders believed the Trump-era proxy voting rule would effectively disenfranchise ERISA fiduciaries from utilizing proxy voting and thus hurt retirement plan participants. H.R. 2988 codifies this Trump-era proxy voting rule.

H.R. 2988 ENDS WORTHWHILE EFFORTS TO INCREASE DIVERSITY IN THE ASSET MANAGEMENT INDUSTRY

Women and people of color are significantly underrepresented in the asset management industry. Specifically, according to the Government Accountability Office (GAO), about 1.4 percent of the $82 trillion in financial assets under management are managed by women or minority-owned firms.[27] 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.

Retirement savers can have their assets managed by diverse firms and expect strong investment returns. In fact, according to

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[23] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Federal Register 55219 (Sept. 4, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09 04/pdf/2020-19472.pdf.

[24] Comment No. EBSA-2020-0008-0284, at 8, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00266.pdf.

[25] Comment No. EBSA-2020-0008-0301, at 2, https://www.regulations.gov/comment/EBSA-2020-0008-0301.

[26] *Id* at 81663.

[27] U.S. Gen Accountability Office, GAO–25–106766, Investment Management: Federal Entities' Efforts to Increase Opportunities for Minority- and Women-Owned Asset Managers (Apr. 2025) [hereinafter April 2025 GAO Report], https://www.gao.gov/assets/gao-25-106766.pdf.

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.[28] GAO reviewed data from 1992 to 2009 and found no significant performance difference between female- and male-managed funds.[29] GAO also reviewed data from 1991 to 2019 and found no significant difference in the performance between white and minority managers.[30] Morningstar, which is a financial services firm, looked at women-run funds and found that they are just as good as men at managing funds, and further that there is "some indication that the industry might be better off with more women at the helm of funds."[31]

H.R. 2988 prohibits plan fiduciaries from selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of the plan based on race, color, religion, sex, or national origin. By doing so, it undermines efforts to increase diversity in the asset management industry. Dozens of organizations voiced opposition to H.R. 2988, noting that "[t]here are sound reasons consistent with fiduciary duty to consider racial, gender, and other types of diversity in selecting asset managers and other service providers and such considerations should not be made illegal."[32]

H.R. 2988 INCLUDES A UNNECCESARY NOTICE THAT REPRESENTS A SOLUTION IN SEARCH OF A PROBLEM

A brokerage window is a feature of defined contribution (DC) plans that allows retirement plan participants to invest in a broader array of investments than the designated investment alternative options selected by the plan fiduciaries. Such investments can include mutual funds, exchange-traded funds (ETF), and, in some cases, individual stocks and bonds. Of the mutual funds that may be offered, some may be ESG-themed funds, which is the clear target of H.R. 2988.

In 2021, the Advisory Council on Employee Welfare and Pension Benefit Plans, which is usually referred to as the ERISA Advisory Council, examined brokerage windows and noted that fewer than one-third of plans offer a brokerage window, and roughly two percent of plan participants with access to one chose to use it.[33] The average brokerage window account balance exceeds $334,000, which is far greater than what many Americans have saved in their DC plans.[34] The ERISA Advisory Council "considered and debated at length" whether additional disclosures were warranted for

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[28] John Lerner, et 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.

[29] April 2025 GAO Report, *supra* note 27 at 21.

[30] April 2025 GAO Report, *supra* note 27 at 21–22.

[31] Madison Sargis and 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 (last visited June 30, 2025).

[32] Americans for Financial Reform letter, *supra* note 4 at 4.

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

[34] *Id.* at 23.

participants who invest through a brokerage window.[35] Most ERISA Advisory Council members "concluded that, on balance, the limited marginal benefits that might be obtained by requiring disclosures would be outweighed by associated costs."[36]

H.R. 2988 requires that a notice be sent to participants or beneficiaries each time they invest in to, out of, or within an investment that is not a designated investment by the plan. The notice consists of four parts that must be substantially similar to the following:

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

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

Committee Democrats strongly support ensuring workers receive appropriate notices and disclosures regarding their retirement savings, particularly with respect to fees on investments. However, H.R. 2988's notice represents a significant departure from the law's primary 401(k) fee disclosure that is objective, information-based, and required to be presented in a manner for the average participant to understand.[37] If H.R. 2988 becomes law, participants interested in an ESG-themed fund, or bond, or a religiously-themed fund offered in their plan's brokerage window may opt not to invest in it.

CONCLUSION

For the reasons stated above, Committee Democrats unanimously opposed H.R. 2988 when the Committee on Education and Workforce considered it on June 25, 2025. We urge the House of Representatives to do the same.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
SUZANNE BONAMICI,
MARK DESAULNIER,
SUMMER LEE,

[35] *Id.* at 46.
[36] *Id.* at 47.
[37] *See* 29 C.F.R. § 2550.404a–5.

ADELITA GRIJALVA,
Members of Congress.

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