118TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
118–227

RETIREMENT PROXY PROTECTION ACT

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

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 5337]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 5337) to amend the Employee Retirement Income Security Act of 1974 to clarify the application of prudence and exclusive purpose duties to the exercise of shareholder rights, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. 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 securities that 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 is following 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, 2024.

PURPOSE

Employee benefit plans have one purpose: to provide employee benefits. Employee benefit plan assets have one purpose: to fund those benefits. The *Employee Retirement Income Security Act of 1974* (ERISA) was designed to ensure that the financial interests of participants and beneficiaries in their benefits do not take a back seat to the political and social preferences of investment fiduciaries. The Biden administration's interpretation of ERISA pushes plans to outsource proxy voting decisions to proxy advisory firms that aggregate those votes and to exercise those votes on matters that may be driven by political or social preferences. H.R. 5337 ensures that shareholder rights, including proxy votes appurtenant to ERISA plan assets, are used only to promote the economic interests of plan participants in their benefits.

COMMITTEE ACTION

117TH CONGRESS

Second Session—Hearings

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

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

118TH CONGRESS

First Session—Hearings

On June 7, 2023, the Committee on Education and the Workforce held a hearing on "Examining the Policies and Priorities of the U.S. Department of Labor" to review the Fiscal Year 2023 budget priorities of DOL. Testifying before the Committee was the Honorable Julie Su, Acting Secretary, DOL, Washington, D.C. At this hearing, DOL's December 1, 2022, final rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder

Rights" was discussed, including concerns regarding the Biden administration's efforts to undermine an investment fiduciary's duties of prudence and loyalty when selecting and monitoring investments for ERISA plans and the administration's support for incorporating ESG into the administration of ERISA plans.

First Session—Legislative Action

On February 7, 2023, Rep. Andy Barr (R–KY) introduced a joint resolution of disapproval (H.J. Res. 30) under the *Congressional Review Act* (CRA) to nullify the Biden administration's DOL final rule titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." The resolution rescinds the Biden 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" which included language on proxy voting for ERISA plans. On February 28, 2023, the House of Representatives passed H.J. Res. 30 by a vote of 219–210, with Senate passage on March 1 by a vote of 50–46. On March 20, the President vetoed the measure. On March 23, the House failed to override the veto by a vote of 219–200.

On September 5, 2023, Rep. Erin Houchin (R–IN) introduced the *Retirement Proxy Protection Act* (H.R. 5337). 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 adopted an Amendment in the Nature of a Substitute offered by Chairwoman Virginia Foxx (R–NC) that made technical changes. Rep. Mark DeSaulnier (R–CA) offered a substitute amendment codifying the Biden administration ESG and proxy voting rule. The substitute amendment failed by a recorded vote of 19–23.

COMMITTEE VIEWS

INTRODUCTION

H.R. 5337, the *Retirement Proxy Protection Act*, clarifies that acts to exercise shareholder rights and vote proxies in ERISA plans must be for the exclusive purpose of providing benefits under the plan and solely in the economic interest of the plan. The bill clarifies that plan assets may not be used to advance or promote interests other than the financial interests of participants and beneficiaries in their benefits under the plan. Accordingly, the bill amends ERISA to provide that it does not require the voting of every proxy or the exercise of every shareholder right. ERISA, together with U.S. Supreme Court precedent, already set forth the requirement that a fiduciary's duty to act solely in the interests of participants and beneficiaries means to act solely in their pecuniary interest in the benefits provided under the plan. However, the Biden administration's DOL has ignored the statute and Supreme Court precedent. H.R. 5337 provides clear guideposts for ERISA plan fiduciaries while reflecting the fiduciary principles inherent in ERISA since its enactment in 1974. H.R. 5337 protects the retirement savings of the U.S. workforce, which is the purpose of ERISA.

The duty of prudence and loyalty under existing law

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

In 2014, the U.S. Supreme Court unanimously rejected non-pecuniary public policy goals as a basis for relaxing ERISA's fiduciary standards.[4] The Court held that ERISA's duty of prudence does not vary depending on a non-pecuniary goal, even if that goal is set out in the plan document,[5] stating:

> Read in the context of ERISA as a whole, the term "benefits" . . . must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. . . . The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.[6]

The Court's holding applies to all non-pecuniary benefits. Thus, under ERISA, there is no room for advancing collateral goals such as ESG by exercising shareholder rights (such as 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."[7] Thus, fiduciaries are held to an expert prudence standard. 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") through the exercise of shareholder rights, including proxy voting exercised in the aggregate by proxy voting advisory firms.

Exercising shareholder rights and voting proxies in ERISA plans

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 investments.[8] ERISA fiduciaries have interpreted DOL's guidance on

---

[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."

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

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

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

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

[6] *Id.* at 421.

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

[8] *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020). *Id.* at 81,658 (discussing letter from Alan D. Leibowitz, Deputy Assistant Sec-

Continued

proxy voting as a regulatory mandate to vote all proxies associated with assets held by an ERISA plan.[9] That is, many institutional investors have historically interpreted DOL guidance to require fiduciaries to vote every share on every matter on a proxy.[10]

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.[11] 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.[12] 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).[13] 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.[14] 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.[15]

In short, ISS and Glass Lewis dominate the proxy advisory market.[16] 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."[17] The Wall Street Journal Editorial Board wrote that ISS and Glass Lewis are "the real driving force behind" an onslaught of ESG proxy resolutions

---

retary, to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. (Feb. 23, 1988)).

[9] 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).

[10] *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.").

[11] *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).

[12] 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).

[13] James K. Glassman & J. W. Verret, *supra* note 9.

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

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

[16] 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").

[17] James K. Glassman & Hester Pierce, supra note 9, at 1.

from progressive investors.[18] Both ISS and Glass Lewis are foreign-owned.[19] 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.[20]

ISS proxy voting guidelines include policies for gender diversity on board composition and an entire section dedicated to "Social and Environmental Issues," including racial equity, political expenditures, and lobbying Congress.

Similarly, Glass Lewis proxy voting guidelines for the United States also demonstrate its activist agenda. For example, the guidelines provide that Glass Lewis "will generally recommend against a nominating and governance committee chair at companies in the Russell 1000 index if the company has not provided any disclosure of director diversity and skills in any of our tracked categories. . . ."[21] Tracked categories include a "percentage-based approach to board gender diversity." The guidelines also provide that "we will generally recommend against the chair of the nominating committee of a board with fewer than one director in an underrepresented community. . . ." The policy guidelines further extend to consideration of exposure to risk "resulting from climate change or membership in trade associations with controversial political ties." In a search of the guidelines, "diversity" appears 47 times and "climate" appears 22 times.

In addition, proxy voting firms may have conflicts of interest.[22] Besides proxy advisory services, ISS provides advisory consulting services and other products and services through ISS Corporate Solutions, Inc. (a wholly owned subsidiary).[23] As early as 2007, the U.S. Government Accountability Office found potential conflicts of interest between the consulting services provided by ISS and its proxy advisory services that could affect vote recommendations.[24]

---

[18] The Editorial Board, *Cracking the Proxy Advisory Duopoly*, Wall Street Journal (July 13, 2023).

[19] *Id.*

[20] ISS, *Americas Proxy Voting Guidelines Benchmark Policy Changes for 2023: U.S., Canada, Brazil, and Americas Regional, available at* https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

[21] Glass Lewis, United States 2023 Policy Guidelines, *available at* https://www.glasslewis.com/wp-content/uploads/2022/11/US-Voting-Guidelines-2023-GL.pdf?hsCtaTracking=45ff0e63-7af7-4e28-ba3c-7985d01e390a%7C74c0265a-20b3-478c-846b-69784730ccbd.

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

[23] *Id.*

[24] 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

Continued

ISS may also advise companies on how to frame proposals to get the most votes.[25] 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.

Trump administration ESG rule

In December 2020, the Trump administration issued a final rule on proxy voting.[26] 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 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 administration proxy rule

In December 2022, DOL issued a final ESG rule that superseded the Trump rule on proxy voting, in effect rescinding the Trump rule.[27] 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 proxy voting regulations put the thumb on the scale against ESG factors.[28] DOL also claimed the Trump rule "may be deterring fiduciaries from taking steps that other market-

---

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. . . .").

[25] James K. Glassman & Hester Pierce, *supra* note 9, 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).

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

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

[28] *Id.* at 73,854.

place investors would take in . . . improving investment portfolio resistance against the potential financial risks associated with climate change and other ESG factors." [29]

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 up ERISA plan assets for the exploitation of 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.

H.R. 5337, Retirement Proxy Protection Act

H.R. 5337 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.[30] 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. H.R. 5337 repeals DOL's perceived regulatory mandate to vote all proxies, which has fueled the use of activist proxy advisory firms that seek to promote ESG goals even at the expense of the economic welfare of ERISA plan participants and beneficiaries.

CONCLUSION

To protect the financial interests of participants and beneficiaries in their benefits, and to reinforce ERISA's existing duties of prudence and loyalty, H.R. 5337 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 as affirmed by the U.S. Supreme Court, remains as clear now as when it was first signed into law. However, the Biden administration's regulations and activist agendas are undermining ERISA's protections. The Biden 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. 5337 is essential for restoring and upholding the intent of ERISA. The U.S. workforce deserves nothing less.

---

[29] *Id.* at 73,826.

[30] Fifth Third Bancorp, 573 U.S. 409, 421 (2014) (the "benefits" to be pursued by ERISA fiduciaries as their "exclusive purpose" does not include "nonpecuniary benefits") (emphasis in original).

SUMMARY

H.R. 5337 SECTION-BY-SECTION SUMMARY

Section 1. Short title

- Names the bill as the "Retirement Proxy Protection Act."

Section 2. Exercise of shareholder rights

Section 2(a) amends ERISA, 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. 5337 does not apply to the voting, tender, and similar rights with respect to securities that 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. 5337.
- 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 plan are a small proportion of plan assets. (H.R. 5337 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. 5337.

Section 2(b) provides that the amendments made by the bill apply to an exercise of shareholder rights occurring on or after January 1, 2024.

EXPLANATION OF AMENDMENTS

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

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)3 of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 5337 takes important steps to protect the interests of the workforce in their benefits provided under ERISA plans with respect to proxy voting. H.R. 5337 is applicable only to investments subject to ERISA and therefore does not affect the legislative branch.

UNFUNDED MANDATE STATEMENT

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

EARMARK STATEMENT

H.R. 5337 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

ROLL CALL VOTES

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

Date:9/14/23

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 7 Bill: H.R. 5337 Amendment Number: n/a

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

Sponsor/Amendment: Rep. Scott/ PV_D_ANS

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

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

Total: 45 / Quorum:42 / Report:

(25 R - 20 D)

Date:9/14/23

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call:8 Bill: H.R. 5337 Amendment Number: n/a

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

Sponsor/Amendment: Rep. Foxx/ HOUCHI_008 MOTION TO REPORT

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

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

Total: 45 / Quorum:42 / Report:

(25 R - 20 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 5337 is to protect the interests of the workforce in their benefits provided under ERISA plans with respect to proxy voting.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 5337 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

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

REQUIRED COMMITTEE HEARING AND RELATED HEARINGS

In compliance with clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the following hearing held during the 118th Congress was used to develop or consider H.R. 5337: "Examining the Policies and Priorities of the U.S. Department of Labor".

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 5337 from the Director of the Congressional Budget Office:

At a Glance

Pension Legislation

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

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

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

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

* = between zero and $500,000.

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

Generally, the bills would:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pay-As-You-Go considerations: None.

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

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

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

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

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

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

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

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

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 5337. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the committee adopts as its own the cost estimate of the bill prepared by the Director of the

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

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

* * * * * * *

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

* * * * * * *

SUBTITLE B—REGULATORY PROVISIONS

* * * * * * *

PART 4—FIDUCIARY RESPONSIBILITY

* * * * * * *

FIDUCIARY DUTIES

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

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

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

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

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

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5)).

(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 em-

ployee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

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

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

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

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

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

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

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

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

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

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

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

(2) For purposes of this subsection—

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

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

(e) SAFE HARBOR FOR ANNUITY SELECTION.—

(1) IN GENERAL.—With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements

of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice

described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.

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

(4) TIME OF SELECTION.—

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

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

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

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

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

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

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

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

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

(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 securities that 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 is following 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.

* * * * * * *

MINORITY VIEWS

INTRODUCTION

H.R. 5337, the *Retirement Proxy Protection Act*, amends the *Employee Retirement Income Security Act of 1974* (ERISA)[1] to codify a Trump Administration regulation regarding proxy voting and shareholder rights.[2] The Trump-era rule, which lacked a sound policy rationale and perpetuated a bias against environmental, social, governance (ESG) investing, sought to disenfranchise retirement plan fiduciaries from exercising their shareholder rights on behalf of workers. H.R. 5338 is opposed by organizations such as the AFL–CIO, Americans for Financial Reform, and US SIF: The Forum for Sustainable and Responsible Investment (US SIF).

CONTEXT FOR H.R. 5337 AND BACKGROUND ON THE TRUMP ADMINISTRATION'S FLAWED VIEWS ON ESG

Retirement savings plans covered by ERISA likely have stocks as part of their investment portfolios.[3] Stock ownership provides an investor with certain shareholder rights, often including the right to vote on matters of corporate governance (*e.g.,* electing the board of directors, executive compensation, shareholder proposals on ESG-related issues). ERISA pension plans often amass large amounts of stock in companies on behalf of workers invested in the plan. There has been a long-standing principle under ERISA that appropriate management of funds includes fiduciaries exercising shareholder rights and voting by proxy for individual investors on these corporate governance matters.

The voting of proxies is not an arbitrary exercise, but rather an economically important mechanism for shareholders to monitor and hold company 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 the risk such malfeasance goes unnoticed. Proxy voting plays a pivotal role in enhancing investment returns by improving corporate accountability and potentially reducing the risk of wrongdoing.

Over decades, the Department of Labor (DOL) has periodically issued guidance on proxy voting issues yet has consistently affirmed that ERISA's fiduciary duties of loyalty and prudence apply

[1] 29 U.S.C. § 1104.

[2] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658, (Dec. 16, 2020), [hereinafter 2020 Final Rule], https://www.govinfo.gov/app/details/FR-202012-16/2020-27465.

[3] *See* John. J. Topoleski & Elizabeth A. Myers, Cong. Rsch. Serv., IF12362, Department of Labor Guidance and Regulations on the Exercise of Shareholder Rights by Private-Sector Pension Plans (2023), https://crsreports.congress.gov/product/details?prodcode=IF12362.

to proxy voting by pension and employee benefit plans.[4] This is because the exercise of shareholder rights is key to ensuring management's accountability to the shareholders that own the company, in this case retirement plan investors.

In 2020, the Trump Administration proposed a rule on proxy voting that overturned such long-standing guidance. The rule was based on a flawed premise that there is a "persistent misunderstanding among stakeholders that ERISA fiduciaries are required to vote all proxies."[5] BlackRock, the world's largest asset manager, submitted a comment letter raising concerns with the premise of the Trump-era proxy voting rule, among other issues. Specifically, BlackRock noted that "fiduciaries do not believe that they are required to vote all proxies; rather, they have concluded that under most circumstances, voting proxies is in the long-term economic interests of plan participants and beneficiaries."[6] 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."[7]

The Trump-era DOL also claimed "some 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 investments . . ."[8] This claim reflected the Trump Administration's assumption that shareholder proposals addressing ESG investing by definition do not have an economic impact on the value of plan assets. This assumption is incorrect. Numerous retirement stakeholders, including publicly traded companies, submitted comments to DOL pointing out that it is often the case that voting proxies on ESG-related issues is in the economic interests of retirement savers. One organization explained that "[c]onsideration of ESG is a well-developed risk management strategy aimed at integrating factors such as climate change and human capital management that evidence shows have a material impact on asset prices, especially when taking into account the risks that long-term, universal investors like pension plans face."[9]

H.R. 5337 CODIFIES A DEEPLY FLAWED TRUMP-ERA RULE

Notwithstanding many stakeholder concerns and opposition, the Trump Administraiton finalized its proxy rule that imposed first-of-its-kind restrictions on plan fiduciaries when it came to exercising shareholder rights. The Trump-era proxy voting rule speci-

---

[4] *See* Letter from U.S. Dep't of Lab. to Mr. Helmuth Fandl, Chrmn. 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 subsequently restated this view in 1994 (Interpretive Bulletin 94–2); in 2008 (Interpretive Bulletin 2008–02); in 2016 (Interpretative Bulletin 2016–01); and in 2018 (Field Assistance Bulletin 2018–01).

[5] 2020 Final Rule, *supra* note 1, at 55222.

[6] Comment No. EBSA–2020–0008–0297, at 3, https://www.regulations.gov/comment/EBSA-2020-0008-0297.

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

[8] 2020 Final Rule, *supra* note 1, at 55222.

[9] Comment No. EBSA–2020–0008–0227, at 2, https://www.regulations.gov/comment/EBSA-2020-0008-0227.

fied that fiduciaries were not required to vote on all proxies and included two safe harbors that permitted fiduciaries to limit or refrain from voting in certain situations.[10] The rule also imposed new onerous recordkeeping requirements and monitoring obligations regarding the exercise of shareholder rights.

Taken together, the requirements of the Trump-era proxy voting rule were seen by many as unnecessary and effectively disenfranchising ERISA fiduciaries and ultimately reducing the rights of retirement plan participants. To that same end, H.R. 5337 would "put a thumb on the scale against fiduciaries exercising shareholder rights on behalf of workers whose deferred wages they are responsible for managing for them, which would result in enhancing the power of public companies" management and decreasing the say and power of workers in the companies they are invested in."[11]

Had Committee Republicans held a legislative hearing on H.R. 5337, Committee Members could have heard testimony and asked witnesses' questions about the bill's deterrent effect on fiduciaries' exercising their shareholder rights. Unfortunately, Committee Republicans failed to hold a legislative hearing on H.R. 5337 and instead hastily marked up the bill shortly after it was introduced.

DEMOCRATIC AMENDMENT OFFERED DURING MARKUP OF H.R. 5337

Committee Democrats put forward one substitute amendment to improve the bill. Offered by Ranking Member Scott (D–VA–3), this amendment would have codified the Biden Administration's proxy voting rule.

Amendment	Offered by	Description	Action taken
#2	Mr. Scott	Codifies the Biden Administration's final proxy voting rule.	Defeated

Finalized in 2022, the Biden rule replaced the Trump-era rule and codified DOL's previously long-held view that a fiduciary's responsibilities include voting proxies. The rule also corrected several objectionable provisions of the Trump-era rule. For instance, it eliminated the language from the Trump-era rule stating that fiduciaries are not required to vote all proxies.[12] It also eliminated the Trump-era rule's safe harbors permitting fiduciaries to limit or refrain from voting proxies in certain situations.[13] The rule also put an end to Trump-era rule's recordkeeping requirements and monitoring obligations on proxy voting activities.[14]

Additionally, unlike the Trump-era rule, the Biden Administration's rule (which addressed both proxy voting and ESG investing generally) was popular and supported by individuals and stake-

[10] 2020 Final Rule, *supra* note 1.
[11] *See* Letter from Americans for Financial Reform to Chair Virginia Foxx and Ranking Member Bobby Scott, H. Comm. on Educ. & the Workforce, Full Committee Markup, (Sept. 13, 2023), at 4, https://ourfinancialsecurity.org/wp-content/uploads/2023/09/9.13.23-CorporateGovernance-Letter-of-Opposition-to-Anti-ESG-Bills.pdf.
[12] "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," 87 Fed. Reg. 73822–73886, (Dec. 1, 2022), https://www.govinfo.gov/content/pkg/FR-2022-12-01/pdf/2022-25783.pdf.
[13] *Id.* at 73849.
[14] *Id.* at 73845.

holder groups. US SIF and other organizations conducted an analysis of the comments submitted to DOL on the Biden Administration's proposed ESG and proxy voting rule. Of the over 22,000 comments submitted by individuals, 97.4 percent were in support of the proposed rule.[15] And of the 144 letters submitted by institutions—such as corporations, asset managers, financial firms, trade groups, and labor organizations—83 percent were supportive, with some recommending modifications.[16] The amendment to codify this rule failed on a party line vote.

CONCLUSION

H.R. 5337 would codify an unnecessary, unpopular, and unreasonable Trump-era rule that curtailed the ability of plan fiduciaries to vote on proxies to the detriment of retirement savers. For the reasons stated above, Committee Democrats opposed H.R. 5337 when the Committee on Education and the Workforce considered it on September 14, 2023. We urge the House of Representatives to do the same.

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

○

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

[16] *Id.* at 3.